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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1958

**Nos. 518 and 536**

THE ATLANTIC REFINING COMPANY, *et al.*,
*Petitioners,*

*v.*

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, *et al.*,
*Respondents.*

TENNESSEE GAS TRANSMISSION COMPANY,
*Petitioner,*

*v.*

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, *et al.*,
*Respondents.*

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

## BRIEF FOR RESPONDENT PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK.

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# INDEX


| | PAGE |
|---|---|
| OPINIONS BELOW | 1 |
| JURISDICTION | 2 |
| QUESTIONS PRESENTED | 2 |
| STATEMENT OF THE CASE | 4 |
| Introduction | 4 |
| The CATCO Applications | 5 |
| The Hearing | 7 |
| The Decision of the Presiding Examiner | 8 |
| The Commission's Order of April 22, 1957 | 10 |
| The CATCO Motion for Modification | 12 |
| The Commission's Order of May 20, 1957 | 13 |
| The Tennessee Application for Rehearing | 14 |
| The So-called "Rehearing" | 15 |
| The Commission's Order of June 24, 1957 | 15 |
| Denial of Further Rehearing | 18 |
| FPC Regulation of Producer Rates in Southern Louisiana—the CATCO Prologue and Epilogue | 19 |
| 1. Natural Gas Act, Section 7 | 19 |
| 2. The Commission's construction and application of Section 7—pre-Phillips | 21 |
| 3. The Gulf Interstate and American Louisiana certifications—1953-54 | 22 |
| 4. June 7, 1954—Phillips | 25 |
| 5. Post-1954 independent producer rate regulation under Sections 4 and 5 | 26 |
| 6. Post-1954 independent producer price regulation under Section 7 (pre-CATCO) | 28 |
| 7. CATCO—June 24, 1957 | 36 |

PAGE

8. Post-1957 independent producer price regulation under Section 7 ..... 36

9. The Commission's report to Congress—January 7, 1959 ..... 43

SUMMARY OF ARGUMENT ..... 45

ARGUMENT:

POINT I. Consideration of the impact of initial price is the *sine qua non* of any determination of whether proposed sales of natural gas should be certificated for the interstate market. It is *the* "prime determinant" ..... 46

POINT II. 1. Threats to withhold gas from the interstate market add nothing to a Section 7 proceeding. Unless the requirements of that section are met in full, the applications to introdue the gas into that market "shall be denied" 52

2. In any event, this particular threat was unrealistic, unreasonable and wholly unsupported and hence afforded no basis for anything, much less for dispensing with the "prime determinant"—price ..... 52

POINT III. 1. The need for gas cannot be evaluated separately or divorced from price ..... 56

2. The need for gas to supply proposed pipeline expansion requirements provides no basis for dispensing with further consideration of the "prime determinant"—price. If anything, it renders it even more imperative that unjustified price exactions be precluded at the threshold of the interstate transmission process ..... 56

3. In any event, the demonstration of such need in this record is wholly insubstantial ..... 56

POINT IV. The judgment of the Court below was eminently correct ..... 60

CONCLUSION ..... 69

TABLE OF CITATIONS.

CASES:


| | PAGE |
|---|---|
| *Accardi* v. *Shaughnessy*, 347 U. S. 260 (1954) | 66, 69 |
| *Alabama-Tennessee Natural Gas Co.* v. *F. P. C.*, 203 F. 2d 494 (CA 3rd, 1953) | 21 |
| *Amarillo-Borger Express* v. *U. S.*, 138 F. Supp. 411 (DC, N. D. Tex., 1956) | 62, 64 |
| *Bel Oil Corp.* v. *F. P. C.*, 255 F. 2d 548 (CA 5th, 1958), *cert. denied* 358 U. S. 804 | 27 |
| *Cia Mexicana De Gas* v. *F. P. C.*, 167 F. 2d 804 (CA 5th, 1948) | 62 |
| *City of Detroit* v. *F. P. C.*, 230 F. 2d 810 (CA DC, 1955), *cert. denied*, 352 U. S. 829 (1956) | 38, 46, 47 |
| *Consolidated Edison Co.* v. *Labor Board*, 305 U. S. 197 (1938) | 54 |
| *Dixie Carriers* v. *U. S.*, 143 F. Supp. 844 (DC, S. D. Tex., 1956) | |
| *Forest Oil Corp.* v. *F. P. C.*, ....F. 2d .... (CA 5th, Feb. 20, 1959) | 27 |
| *F. P. C.* v. *Hope Natural Gas Co.*, 320 U. S. 591 (1944) | 21, 46 |
| *Hudson River Day Line* v. *U. S.*, 85 F. Supp. 225 (DC, S. D. N. Y., 1949) | 62, 63 |
| *May Stores* v. *Labor Board*, 326 U. S. 376 (1945) | 67 |
| *Oklahoma Nat. Gas Co.* v. *F. P. C.*, 257 F. 2d 634 (CA DC, 1958), *cert. dismissed* U. S. (1959) | 35, 48 |
| *Panhandle Eastern Pipe Line Co.* v. *F. P. C.*, 169 F. 2d 881 (DC Cir., 1948), *cert. denied*, 335 U. S. 854 (1948) | 21 |
| *Phillips Petroleum Co.* v. *State of Wisconsin*, 347 U. S. 672 (1954) | 21, 25, 46 |
| *Public Service Commission of New York* v. *F. P. C.* (CA 3rd, No. 12,805) | 42, 61 |
| *Signal Oil & Gas Co.* v. *F. P. C.*, 238 F. 2d 771 (CA 3rd 1956), *cert. denied*, 353 U. S. 923 (1957) | 34, 47 |

PAGE

*United Gas Improvement Company and Philadelphia Electric Company, Petitioners* v. *Federal Power Commission, Respondent* (CA 3rd, No. 12,797) ..... 42, 61

*Wolf* v. *Boyd*, 238 F. 2d 249 (CA 9th, 1956) ..... 66

F. P. C. DOCKETS:

*Matter of Alabama-Tennessee Natural Gas Co.*, 9 F. P. C. 461 (1950); 11 F. P. C. 75 (1952) ..... 21

*Matter of Alabama-Tennessee Natural Gas Company, et al.*, Docket G-2534 (1955) ..... 36

*Matter of American Louisiana Pipe Line Company*, Docket No. G-2306, Opinion 276, 6 PUR 3d 476 (1954) ..... 7, 24

*Matter of Champlin Oil & Refining Co.*, Docket No. G-9277 ..... 23

*Matter of Cities Service Gas Co., et al.*, Docket Nos. G-2569 *et al.*, Opinion No. 288, 14 F. P. C. ....; 12 PUR 3d 3 (1955) ..... 32

*Matter of Commonwealth Natural Gas Corp.*, 9 F. P. C. 70 (1950) ..... 21

*Matter of Forest Oil Corporation*, Docket No. G-5510 (order issued April 26, 1957), 17 F. P. C. 586 ..... 26

*Matter of Gulf Interstate Gas Company*, Docket No. G-2058, Opinion 251, 12 F. P. C. 116 (1953) ..... 23

*Matter of Hope Nat. Gas Co.*, Docket No. G-12571, 19 F. P. C. 405, March 31, 1958 ..... 61

*Matter of Kansas Pipe Line & Gas Co.*, 2 F. P. C. 29 (1939) ..... 21

*Matter of Natural Gas Pipeline Company of America*, Docket No. G-4280, Opinion 299, 16 F. P. C. 80, 16 PUR 3d 277, December 4, 1956 ..... 35

*Matter of Negley*, 17 F. P. C. 550 (1957) ..... 27

*Matter of Pan American Petroleum Corp.*, Docket No. G-8549, Opinion 310, April 4, 1958, 19 F. P. C. 463 ..... 27, 38

PAGE

*Matter of Seaboard Oil Co.*, Docket No. G-11970, Opinion 309, 19 F. P. C. 416, March 31, 1958 ..... 40, 61

*Matter of Sinclair Oil and Gas Co., et al.*, Docket No. G-9049, *et al.*, 15 F. P. C. 665 (1956) ..... 32

*Matter of Southern Nat. Gas Co.*, Docket No. G-13082, 19 F. P. C. 558, April 18, 1958 ..... 39

*Matter of Sun Oil Co.*, G-15122, March 3, 1959 ..... 42

*Matter of Sun Oil Company, et al.*, Docket Nos. G-8288, *et al.*, February 6, 1957, 17 F. P. C. 174 ..... 26

*Matter of Sunray Mid-Continent Oil Co.*, Docket No. G-12211, 19 F. P. C. 618, May 9, 1958 ..... 39

*Matter of Superior Oil Co.*, Docket No. G-12121, 19 F. P. C. 637, May 9, 1958 ..... 61

*Matter of Tamborello, et al.*, Docket No. G-3045, *et al.*, Opinions Nos. 287, 11 PUR 3d 413 (1955), and No. 287-A, 15 F. P. C. 1 (1956), 12 PUR 3d 219 ..... 30

*Matter of Tennessee Gas Transmission Co.*, 4 F. P. C. 293 (1945) ..... 21

*Matter of Tennessee Gas Transmission Co.*, 9 F. P. C. 271 (1950) ..... 21

*Matter of Tennessee Gas Transmission Co.*, Docket No. G-5259 (1955) ..... 47

*Matter of Transcontinental Gas Pipe Line Corp.*, Docket Nos. G-13143 *et al.*, Opinion 315, 20 F. P. C. 264, September 4, 1958 ..... 36, 44, 45, 61

*Matter of Trunkline Gas Co.*, Docket No. G-15394 ..... 43, 61

*Matter of Union Oil Company of California, et al.*, Docket Nos. 4331 *et al.*, Opinion 300, 16 F. P. C. 100 (1956) ..... 26

*Matter of United Gas Pipe Line Co.*, 10 F. P. C. 35 (1951) ..... 21

*Matter of United Gas Pipe Line Co.*, Docket No. G-12712, 19 F. P. C. 931, June 12, 1958 ..... 61

PAGE

MISCELLANEOUS:

*Analysis of Initial Prices in Contracts for Interstate Gas Sales from Fields in Southern Louisiana* (Chapin) ..... 23

F. P. C. Annual Reports

1949 ..... 22
1950 ..... 22
1951 ..... 22
1952 ..... 22
1953 ..... 22
1954 ..... 22
1958 ..... 43

*Gas Distributors Information Service, Field Price Study of Natural Gas* (1958) Sched. 1 ..... 23

*Hearings before the House Committee on Interstate and Foreign Commerce on H. R. 5429*, 77th Cong., 1st Sess. ..... 20

*House Report No. 1290*, 77th Cong., 1st Sess. (1941) 20

*Sen. Rep. No. 948*, 77th Cong., 2d Sess. (1942) ..... 21

*Threshold Prices: A Practical Proposal for Producer Pricing* (Connole) 63 Public Utilities Fortnightly 23, 26-27, Jan. 1, 1959 ..... 42

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## BRIEF FOR RESPONDENT PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK.

### Opinions Below.

The opinion of the Court of Appeals for the Third Circuit (R. 653-662) is reported at 257 F. 2d 717. The opinion of the Federal Power Commission (R. 484-497) is reported at 17 F. P. C. 880; and its opinion on rehearing (R. 541-542) at 18 F. P. C. 169.

## Jurisdiction.

The judgment of the Court of Appeals was entered on June 30, 1958 (R. 663). Petitions for rehearing were denied on August 27, 1958 (R. 667). The petitions for writs of certiorari in Nos. 518 and 536 were filed on November 14 and 24, 1958, respectively. They were granted (upon acquiescence of respondents) on January 12, 1959 and the cases consolidated (R. 669). The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1) and §19(b) of the Natural Gas Act, 52 Stat. 831 (1938), 15 U. S. C. 717r(b).

## Questions Presented.

In the context of the lapse of five years since this Court apprised the Federal Power Commission that the Natural Gas Act encompassed producer sales for resale in interstate commerce, with little or no progress in the interim toward ascertainment of "just and reasonable" producer rates under Sections 4 and 5, and with concomitant phenomenal increases in both the demand for natural gas and the negotiated prices for the product at the wellhead:

1. Does the applicant in a producer-sale certificate proceeding under Section 7 of the Natural Gas Act have the burden of proving that public convenience and necessity require the sale?

2. Is not the initial price proposed a vital element of that statutory standard and that burden of proof?

3. Does the applicant adequately meet that standard and discharge that burden by proving merely (1) the existence and validity of the contract of sale and (2) its negotia-

tion in arms'-length bargaining—and nothing more—when cross-examination develops (a) that the initial price proposed exceeds any ever certificated in the area of the sale, and (b) that the initial price proposed will increase the pipeline purchaser's gas acquisition costs considerably?

4. Does the producer-applicant absolve himself of his burden in this respect by (a) showing that the pipeline purchaser needs (or can transmit and sell) more gas and (b) threatening to (or permitting others to represent that he will) withhold his gas from the market unless he receives a certificate upon his own terms?

5. In acting upon a producer-sale certificate application under Section 7 of the Natural Gas Act, is not the Federal Power Commission required to consider the initial price proposed?

6. In order to certificate such a sale unconditionally must not the Commission find and determine that public convenience and necessity require the sale at the initial price proposed?

7. May the Commission certificate such a sale unconditionally when the proof demonstrates (1) the existence and validity of the contract of sale and (2) its negotiation in arms'-length bargaining, but also shows (a) that the initial price proposed exceeds any ever certificated in the area of the sale and (b) that the initial price proposed will increase the pipeline purchaser's gas acquisition costs considerably?

8. Under the circumstances enumerated in question 7 *supra*, may the Commission leave untouched its twice-made findings that public convenience and necessity do not

require unconditional certification of the sale at the initial price proposed and then proceed to grant such a certificate simply because (1) the pipeline purchaser needs (or is presumed to need) more gas and (2) the producer-applicant threatens (and is presumed to be serious) to withdraw his application and his gas unless he gets from the Commission exactly what he wants?

9. Is not pursuit of the latter course by the Commission in excess of its statutory authority and may not the Court below so hold when considering a petition ascribing to the Commission the commission of grievous error of law?

## Statement of the Case.

### Introduction.

The proceedings below were instituted by the Public Service Commission of the State of New York, and jointly by Long Island Lighting Company and Public Service Electric and Gas Company, pursuant to Section 19(b) of the Natural Gas Act, to review and set aside a final determination and order of the Federal Power Commission made on June 24, 1957 in its consolidated proceedings entitled, respectively, "*In the Matters of Continental Oil Company,* Docket G-11024, *Atlantic Refining Company,* Docket G-11034, *Cities Service Production Company,* Docket No. G-11046, and *Tidewater Oil Company,* Docket G-11049."

Continental Oil Company, The Atlantic Refining Company, Cities Service Production Company and Tidewater Oil Company (hereinafter called the "CATCO applicants"), petitioners before this Court, are independent natural gas producers extensively engaged, among other things, in the production and sale of natural gas in and offshore the coast of the State of Louisiana. They are holders of permanent unconditional certificates of public

convenience and necessity for the instant gas sales, issued by the Federal Power Commission (hereinafter called "the FPC" or "the Commission") pursuant to its order of June 24, 1957.

Petitioner Tennessee Gas Transmission Company (hereinafter called "Tennessee") is a gas transmission company engaged in the transportation and sale for resale in interstate commerce of natural gas from southwestern areas of the United States to the northeastern states. It is an important supplier of natural gas to distributors in New York State, through sales directly to some and indirectly to others.

Respondent Public Service Commission of the State of New York is a commission created and existing under the laws of the State of New York. It is directed and authorized by Article IV of the New York Public Service Law to exercise general regulatory supervision over gas corporations in the State of New York, including supervision over the rates and charges of said companies. In the discharge of its official duties under that statute (Section 12) it has intervened and participated in numerous producer certification proceedings before the Federal Power Commission involving proposed sales of natural gas which would be transported, resold and ultimately consumed in New York State or which, though destined for other markets, would affect the price of gas so transported, resold or consumed.

**The CATCO Applications.**

By applications filed with the Federal Power Commission during the first half of September, 1956, the CATCO producers applied for certificates of public convenience and necessity under Section 7(c) of the Natural Gas Act, 15 U. S. C. §717f(c), to sell to Tennessee approximately

240,000 Mcf of natural gas per day from leases located in the Gulf of Mexico, offshore the coast of Cameron and Vermilion Parishes, Louisiana, pursuant to contracts executed during August, 1956.

The prices contained in each of the four contracts and proposed by each of the four producers in their applications for certificates of public convenience and necessity, begin at 22.4¢ per Mcf and are to ascend, by periodic increases of 2¢ every four years, beginning in 1962, to a terminal price in 1986 of 35.4¢ per Mcf (CATCO Exh. Item A, R. 286a-328a, 310a-311a, R. 19a). As thus proposed, the initial contract price was higher and the periodic increases were steeper than those of any previously certificated sale by any producer to any pipeline company in the entire Southwest. That initial price exceeded the highest previously certificated price by 1.4¢ per Mcf; the highest price currently paid by Tennessee by 4.4¢ per Mcf; and, by some 10¢, the average cost to Tennessee of all the gas it had previously contracted to buy.

The New York Commission and several distributing company customers of Tennessee (including respondents herein, Long Island Lighting Company and Public Service Electric and Gas Company), and Tennessee itself intervened in the consolidated proceedings involving the CATCO applications (R. 329a, 330a-331a). Except for Tennessee which, as a party to each of the four underlying contracts, indicated that it would support the producers' applications, all of the intervenors asserted that they were opposed to the issuance of unconditional certificates to the applicants at the proposed contract prices. In this, they were prompted by the absence of any demonstration whatever in justification of those prices or showing that they were reasonably in the public interest or that the sales at that

price level were required by public convenience and necessity (R. 10-16, 642-649, 650-657, 658-663, 669, 685-693).*

**The Hearing.**

The hearing on the CATCO applications was held on February 28, 1957 and concluded the following day. This short, perfunctory performance (327 pages of testimony and 6 exhibits) elicited little information of value in resolving the important questions of public interest involved in the applications. No evidence whatever was adduced to justify, rationalize or even explain the proposed prices—except evidence that Tennessee had to go that high to outbid several competing, would-be purchasers, in a sellers market (R. 42a). On the contrary, Tennessee's witness, Mr. Witmer, on cross examination admitted that they were unprecedentedly high; that the initial price of 22.4¢ per Mcf was higher (and the periodic increases steeper) than

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* Concurrently, by application dated September 19, 1956, Tennessee also applied to the Commission for a certificate of public convenience and necessity, pursuant to Section 7 of the Natural Gas Act, for authority to institute a large pipeline construction program to expand the capacity of its transmission system. It was for the specific purpose of this contemplated expansion that Tennessee contracted with the CATCO applicants for the acquisition of the gas to be supplied under the contracts involved in this case (R. 46). Included in that application was Tennessee's request for authority to construct 107 miles of pipeline to gather the CATCO gas from the offshore drilling platforms to its main pipeline system at Kinder, Louisiana, at a cost of over $16 million. The onshore line comprises 46.4 miles; offshore, 60.8 (R. 46a; cf. Tenn. Br., p. 5).

By an order issued March 29, 1957, the Commission denied a motion by the New York Commission to consolidate Tennessee's application (Docket No. G-11107) with the CATCO applications (R. 764-7). By another order issued on the same date, however, the Commission consolidated the Tennessee application with some 19 other dockets unrelated to the CATCO sales. *Matters of American Louisiana Pipeline Company, et al.*, Docket Nos. G-2306, *et al.* The hearing in those consolidated matters did not commence until May 14, 1957. That proceeding terminated with the issuance of a permanent certificate, substantially as Tennessee had requested, on January 28, 1959.

in any other gas purchase contract of Tennessee (R. 238-239). The highest price Tennessee was then paying in the entire Southwest was 18¢ per Mcf (R. 254). The witness did not know of any certificated sale at as high a price as that called for by the CATCO contracts (R. 252-253). Indeed, the actual cost of this gas to Tennessee would be far more than the wellhead price of 22.4¢ per Mcf, since the additional cost of bringing the gas into the Tennessee system would have to be included, i.e., the annual return, tax on return, and depreciation applicable to the 107-mile gathering pipeline system Tennessee was to construct at a cost of over $16 million (R. 266). Rudimentary mathematical computation of this additional cost would add 3 to 4¢ per Mcf to the contract price. Tennessee's witness testified that the purchase of this gas would "only" increase Tennessee's average cost of gas from 12.73¢ to 13.70¢ per Mcf (R. 52)—but he refused to divulge the working papers by which he arrived at this conclusion and the examiner declined to direct their production (R. 240).

**The Decision of the Presiding Examiner.**

On March 29, 1957, the presiding examiner rendered his intermediate decision (R. 742-762). He completely rejected —erroneously, as the Commission itself later held—the contentions of intervenors that the requested certificates should not be issued, absent proof that the sales at the proposed high prices were in the public interest, except upon condition that the initial price be reduced to some less disruptive level. Completely misconceiving the incidence of the burden of proof, the examiner stated in substance that since the *intervenors* had not established that the proposed prices would *necessarily* result in a rate

increase filing by Tennessee,* and that some other price would be more appropriate, the sales should be authorized without further ado (R. 756-760).

However, the examiner was clearly troubled by the absence of any evidence concerning Tennessee's need for this tremendous supply of gas. He specifically pointed out that:

> "Tennessee's purpose was to obtain gas reserves to supply the expansion of Tennessee's market as shown in Tennessee's pending application in Docket G-11107. None of the data which it is *assumed* was filed in support of such application is in evidence in this proceeding." (R. 754, emphasis added.)

While recognizing that, in general, the demand for gas was high, in relation to its supply, he emphasized that the "facts of this proceeding indicate that these reserves are important to Tennessee's *expansion* . . ." but pointed out that "any finding to the effect the public convenience and necessity requires or will require the issuance of certificates to Applicants in *this* proceeding would be confronted with the fact that a contrary finding made with respect to Tennessee's application for a certificate which is pending in Docket No. G-11107 would be in conflict as Tennessee proposes to use the reserves which are the subject of this proceeding in connection with its *expansion program* which is the subject of its application in G-11107." (R. 760, emphasis added.) Accordingly, he qualified and condi-

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* Almost immediately after the certifications herein, Tennessee included the prospective cost of CATCO gas in an unsuccessful attempt to settle its then pending rate case (Docket No. 11980). Upon expiration of the Section 4 suspension period (May 15, 1959) Tennessee will commence collecting increased rates from its customers based directly thereupon (Docket No. G-17166). Cf. R. 43, 202 and CATCO Br. pp. 29, 31.

tioned his findings and order "upon a certificate being issued to Tennessee in G-11107 . . ." (R. 760).*

The New York Commission and other intervenors promptly filed exceptions to the neglect of the examiner to recommend the imposition of further conditions relating specifically to the matter of initial price (R. 768-788, 789-806, 813-822, 829-833).

**The Commission's Order of April 22, 1957.**

By its first determination and order in this case, the Commission completely reversed the decision of its presiding examiner with reference to the price considerations involved in the CATCO applications. Holding squarely, and properly, that "this crucial sale should not be permanently certificated unless the rate level has been shown to be in the public interest" (R. 835)—the Commission further said:

> "The record contains insufficient evidence or testimony, however, on which to base a finding that the public convenience and necessity requires the sale of these volumes of gas at the particular rate level here proposed. The importance of this issue in certificating this sale cannot easily be overemphasized. This is the largest reserve ever committed to one sale. This is the first sale from the newly developed offshore fields from which large proportions of future gas supplies will be taken. This is the highest price

* On the same day that the examiner's report was issued, the Commission granted Tennessee a temporary certificate for facilities covered by its application in Docket No. G-11107, but specifically excluding the 107 miles of pipeline which Tennessee was to construct to bring the CATCO gas ashore (R. 836, n. 1). Thus, the Commission, without a hearing in Tennessee's Docket No. G-11107 (no hearing being required for the issuance of a temporary certificate) and wholly independent of any of the issues, including price, involved in the pending CATCO applications, certificated expansion of Tennessee's plant capacity, which expansion was designed in major part to enable it to carry this additional and other large volumes of gas

level at which the sale of gas to Tennessee Gas has been proposed."

"Those factors make it abundantly evident that, in the public interest, this crucial sale should not be permanently certificated unless the rate level has been shown to be in the public interest" (R. 835).

The Commission then proceeded to misconstrue the decision of the presiding examiner with reference to the matter of Tennessee's need for gas. It stated, incorrectly, that the examiner "has found there is a need for those volumes of gas on the system of Tennessee Gas" which finding the Commission "adopted" (R. 836)—whereas the examiner had actually found that the gas *presumably* would be needed, *only* if the Commission authorized Tennessee's proposed expansion of the capacity of its system in Docket No. G-11107. Thus, the Commission "adopted" a finding which the examiner *had not made*, and which was *not* supported by the record in this case (and could not have been supported by the record in Docket G-11107 either, since none had then been compiled), *i.e.*, "a need for those volumes of gas on the system of Tennessee Gas" (R. 836).

Based upon that finding, the Commission directed the issuance of *temporary* certificates to the CATCO applicants but remanded the proceeding to the presiding examiner, "to determine at what rates the public convenience and necessity requires these sales to be made if permanent certificates are to be granted to these companies upon final disposition of their applications" (R. 836). The order specifically imposed the burden of proof and the burden of going forward with the presentation of evidence upon remand, upon CATCO and Tennessee (R. 838).

Simultaneously, the Commission abstracted from Tennessee's pending application (Docket G-11107) that part

thereof which related to the construction of the proposed gathering pipeline system between the offshore platforms and its main line at Kinder, Louisiana, and granted a temporary certificate to Tennessee to construct and operate that 107 miles of line (R. 838).

**The CATCO Motion for Modification.**

Supported by Tennessee, the CATCO applicants moved for rehearing of the order of April 22, 1957 (R. 851-863, 896-901), asserting that the "economic risk" to which they would be exposed (the exact nature of which was not elaborated upon) would "foreclose" their acceptance of temporary certificates (R. 854).

> ". . . They say further that they could not present sufficient evidence at the hearing contemplated by the Commission's order within any reasonable period in the future and could not afford to commence construction until at least the initial rate question is resolved" (R. 904).

As an inducement to the Commission to rescind its order of remand and to issue permanent and unconditional certificates, the CATCO applicants offered to modify slightly the contracts of sale, *but not as to the initial price of 22.4¢ per Mcf.**

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* The proposal related to the so-called Harris Bill then pending before Congress (H. R. 6790, 85th Congress) which, if enacted, would have excluded from the Commission's supervision the contract clauses calling for *definite* fixed price increases. The CATCO applicants proposed to amend the contracts to make the price increase clauses *indefinite*, so that, if the Harris Bill were enacted, future increases would be governed by "reasonable market price" as determined by the Commission under the terms of the Harris Bill, thus assuring the Commission continuing jurisdiction, of a sort, over the price of future, i.e., post-1962 deliveries (R. 857-8). Contrary to Tennessee's assertion herein (Br., p. 4, ftn. 5), this gesture in no way "alleviated" the concern of *this* respondent pertaining to the future price escalation provisions.

**The Commission's Order of May 20, 1957:**

The Commission's second order (R. 903-9) was unique. It did not retract one whit from its prior determinations: (1) that the proposed sales should not be certificated in the absence of proof that the initial price was in the public interest and, in fact, reiterated (2) that "the record does not contain sufficient evidence on which to base a finding that the public convenience and necessity requires the sale of the gas at that particular rate level" (R. 904).

Instead, the Commission adopted a procedure which would have deferred price considerations to a subsequent rate increase proceeding, to be instituted pursuant to Section 4 of the Natural Gas Act, in which the burden of proof would have been upon the CATCO companies to establish that the price of 22.4¢ per Mcf was just and reasonable, failing which they would have been required to refund excessive sums collected—(rather than a proceeding under Section 5 of the Act, in which the Commission itself would have the burden of establishing that the existing rate was *not* just and reasonable, upon demonstration of which there would be no recoupment of past excessive exactions).

The scheme contained in the May 20 order was this: the Commission's April 22 order, including the remand of the proceeding to the presiding examiner, was abrogated. Permanent certificates were authorized, upon condition that the CATCO proposals be amended to provide (1) for an initial price of 18¢ per Mcf—the highest price then being paid by Tennessee; (2) that CATCO should be permitted to file for a *rate increase* to 22.4¢ per Mcf to be effective *one day* after commencement of delivery of gas to Tennessee; (3) such increased price would continue until November 1, 1962, unless changed by the Commission in a Section 4 rate proceeding to be instituted upon that rate

increase filing; and (4) indefinite pricing clauses should govern any price increases on and after November 1, 1962—and the Commission, on its part, "assured" the CATCO applicants that it would *limit any suspension* of the 22.4¢ rate increase filing to a *period of 24 hours!*

The effect of the May 20 order would have been to permit the CATCO applicants to collect the originally proposed contract price of 22.4¢ per Mcf (except for the first day's deliveries and the succeeding one-day suspension thereof) but, to require them, under Section 4 of the Natural Gas Act, to establish that such price was just and reasonable, and, failing that, to refund to Tennessee (and thereby, in effect, to the consuming public) any unjustified amounts collected in excess of 18¢ per Mcf. Thus, as Commissioner Connole later put it, the Commission "made unprecedented efforts to ensure fair treatment . . . [and] clearly evidenced our intention to cooperate in arriving at an initial price level that would be just and reasonable to all parties affected" (R. 930).*

**The Tennessee Application for Rehearing.**

On June 3, 1957 Tennessee, but not the CATCO applicants, filed an application for rehearing and reconsideration of the Commission's May 20 order (R. 910-17). This petition also was unique. It expressly stated that it was "not the purpose of this application to reargue the question of the legality of the Commission's order. . . . Rather it is our purpose here to inform the Commission of recent developments . . ." (R. 911-12). These were stated as follows:

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* Actually, the 18¢ per Mcf. rate level has never been determined to be "just and reasonable" and is, in fact, the subject of potential inquiry in pending Section 4 and Section 5 proceedings. See *infra*, pp. 26-28.

"Tennessee has been definitely advised by the producer-applicants that they will not amend Section 10 of the contract so as to change the initial rate from 21.4 cents [ex-tax] per Mcf to 17 cents [ex-tax] per Mcf. Tennessee has been further informed by the producer-applicants that the certificates issued by said order will not be accepted by them for that reason, and that, accordingly, the contracts will be terminated" (R. 912).

**The So-Called "Rehearing".**

On June 6, 1957, the Commission purported to grant a "rehearing" (R. 920). In fact, no further hearing or "rehearing" was held—no additional evidence whatever was ever added to the original record. Instead, the Commission merely directed oral argument by counsel for the respective parties, to be heard on June 12, 1957. On that occasion, the CATCO attorneys equivocated and vacillated like the four winds when pinned down on the point, but *implied* the sincerity of their client's purported threats to terminate the contracts. No witness was called and sworn to testify to the threats or to explain what was to be done with this tremendous quantity of gas if the threats were carried out—or, in other words, that the threat actually could and would be carried out. Thus, the Commission's quasi-judicial administrative proceeding was permitted to degenerate into a poker table discussion at which pure bluff was permitted to supplant the public interest as the subject matter of the case.

**The Commission's Order of June 24, 1957.**

The bluff worked. On June 24, 1957, the Commission by a 3 to 1 vote (Chairman Kuykendall not voting) issued the order under review herein (R. 923-9). It accepted the

unsupported CATCO bluff-threat as reality—not in the sense that it actually could and would be carried out, but that the CATCO applicants "would *seek* to dispose of their gas elsewhere than to Tennessee Gas and the interstate market" (R. 925, emphasis added), with success of the effort being assumed.

Thus, the Commission threw in its hand, "modified" its May 20 order and granted permanent certificates approving the sales "without any condition affecting the initial price of 21.4 cents [ex-tax] per Mcf"—reporting to be motivated solely by (1) the bluff-threat and (2) "the great demand for gas by customers of Tennessee" (R. 925). In so doing, the Commission completely overlooked the fact that there had been *no showing whatever in this or any other record before it* of any need (great, supervening or other) by Tennessee or the consuming public for this gas at the unprecedentedly high price of 22.4¢ per Mcf.

The mistaken rationale for the Commission's final action in this case is contained in the following few sentences of its June 24 order:

> ". . . In reaching a solution of this problem we are moved by the primary consideration that the public served through the Tennessee Gas system is greatly in need of increased supplies of natural gas. Further, it appears to us, important as is the issue of price, that as far as the public is concerned, the precise charge that is made initially is less important than the assurance of this great supply of gas. In view of these circumstances and the fact that the record does not show that the 21.4-cent rate [ex-tax] is necessarily excessive, we agree with the presiding examiner that this certificate proceeding under Section 7 of the Natural Gas Act should not assume the character of a rate proceeding under Section 5(a). We are of the opinion that, in the circumstances of

this case, in view of the great demand for gas by customers of Tennessee Gas, the price consideration should not be made the prime determinant of what the public convenience and necessity require" (R. 925).

Having so thrown in its hand, the Commission held out one card for what it might be worth—rate investigations under Section 5 of the Act, under which the burden would be upon the Commission to establish that the 22.4¢ rate was unreasonably high: "However, because the 21.4 cent [ex-tax] price as we have heretofore observed, is higher than Tennessee Gas is paying under any other contract, it should be subject to prompt investigation under Section 5(a) as to its reasonableness" (R. 926).

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From this entire performance, only Commissioner Connole dissented (R. 930-34). The following excerpt from his opinion goes to the crux of the matter:

"Nothing but threats by the producers supports the proposition that this gas would be barred forever from the interstate market. And the very quantity of offshore gas affected by this decision makes it clear that the only practical market for gas of this kind for years to come is to the large consuming areas served by the long haul interstate pipelines. In my judgment the pricing pattern should not be set for so crucial a supply source in an atmosphere charged with urgency and in response to arguments whose primary motivation is private, not public, gain. The election by the producers to reject their public responsibility and insist on exercising the full strength of their bargaining position has altered completely the impact of logical and equitable arguments.

> The decision of the majority is justifiable only by the evil consequences of the loss of these reserves to the particular pipeline which is a party to the contracts. Such evils would, in the opinion of the majority, exceed the gain to follow from *the proof that the public convenience and necessity does not require the sale of this gas at proposed rates.*" (R. 932-3, emphasis added.)

**Denial of Further Rehearing.**

On July 23, 1957, the New York Commission applied for rehearing of the Commission's June 24 order (R. 1002-13). It was denied by order issued August 15, 1957 (R. 1025-6). Thereafter, the New York Commission sought review in the Court below (R. 475-542). On June 30, 1958, that Court reversed the Commission's order and remanded the matter for further proceedings consistent with its opinion (R. 653-662).

* * * * * * *

Before proceeding with the summary of our argument, we believe it important—and trust it will be found helpful to the Court—to place this important determination of the Commission in its proper context. Appreciation of its evolution and of its succession is vital to full comprehension of its ramifications and impact. It is but one step—a headlong one—in a decisional evolution which, we believe, evidences virtual abnegation by the Commission of its responsibilities to regulate the natural gas industry's interstate sales for the protection of the ultimate consumer of that product. That evolution follows:

## FPC Regulation of Producer Rates in Southern Louisiana—the CATCO Prologue and Epilogue.

### 1. Natural Gas Act, Section 7.

Section 7 in pertinent part, provides:

> "(c) No natural-gas company or person which will be a natural-gas company . . . shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, . . . unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations. . . ."
>
> "(e) . . . a certificate shall be issued to any qualified applicant therefor, authorizing the . . . sale, . . . covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed . . . sale, . . . to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require."

The section was enacted in its present form upon recommendation of the Commission in 1942 (56 Stat. 83, 84). The original 1938 enactment had provided for FPC certification of a natural gas company's expansion into an area already served by another and admonished the Commission in exercising that prerogative to

> "... give due consideration to the applicant's ability to render and maintain adequate service at rates lower than those prevailing in the territory to be served, it being the intention of Congress that natural gas shall be sold in interstate commerce, for resale for ultimate public consumption for domestic, commercial, industrial or any other use at the lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest" (Natural Gas Act of 1938, §7(c); 52 Stat. 825).

Thereunder, price was the principal feature of a certificate case. That it was to remain the essential ingredient—the determinative factor—in any and all certificate applications under the revised Section 7 is made abundantly clear by the legislative history of the present section. *Hearings before the House Committee on Interstate and Foreign Commerce on H. R. 5429,* 77th Cong., 1st Sess.; *House Report No. 1290,* 77th Cong., 1st Sess. (1941):

> "... By the unregulated construction of a pipe line, uneconomic construction, or inflated costs may make proper regulation of operation thereafter difficult or practically impossible. *The bill when enacted will have the effect of giving the Commission an opportunity to scrutinize the financial set-up,* the adequacy of the gas reserves, the feasibility and adequacy of the proposed service, *and the characteristics of the rate structure in connection with the proposed construction or extension at a time when such vital matters can readily be modified as the public interest may demand.* Without such authority the Commission may find itself confronted with a situation where it must either accept conditions which appear undesirable in the public interest, or require, subsequent to construction, changes which may have much more serious practical consequences than they would have had if they had been made before the public was

asked to finance the enterprise" (pp. 2-3; emphasis supplied).

See also, *Sen. Rep, No. 948,* 77th Cong., 2d Sess. (1942) at pp. 1-2.

> "These provisions [Sections 4, 5 and 7] were plainly designed to protect the consumer interests against exploitation at the hands of private natural gas companies." *F. P. C.* v. *Hope Natural Gas Co.,* 320 U. S. 591, 612 (1944).

**2. The Commission's construction and application of Section 7—pre-Phillips.***

Consistently and meticulously (with two exceptions to be noted, *infra,* par. 3) did the Commission pursue the matter of price in each and every certificate application it considered, prior to the advent upon the regulatory scene of the independent producer-natural gas company. If the proof submitted in the certificate proceeding did not demonstrate the essential reasonableness of the price element—thus warranting unconditional certification—rate or price conditions were imposed having that design or, in the alternative, the application was denied. See, *e. g., Kansas Pipe Line & Gas Co.,* 2 F. P. C. 29 (1939); *Tennessee Gas Transmission Co.,* 4 F. P. C. 293, 300-306 (1945); *Michigan-Wisconsin Pipe Line Company,* 6 F. P. C. 1, 19-20 (1947); *aff'd sub nom. Panhandle Eastern Pipe Line Co.* v. *F. P. C.,* 169 F. 2d 881 (D. C. Cir., 1948), *cert. denied,* 335 U. S. 854 (1948); *Commonwealth Natural Gas Corp.,* 9 F. P. C. 70, 78 (1950); *Tennessee Gas Transmission Co.,* 9 F. P. C. 271, 276 (1950); *United Gas Pipe Line Co.,* 10 F. P. C. 35, 45-46 (1951); *Alabama-Tennessee Natural Gas Co.,* 9 F. P. C. 461 and 849 (1950); 11 F. P. C. 75, 91, 114 (1952), *aff'd* 203 F. 2d 494 (3rd Cir., 1953).

* *Phillips Petroleum Co.* v. *Wisconsin,* 347 U. S. 672 (1954).

Before the 3rd Circuit in the latter proceeding the FPC averred:

> "... the rates which an applicant for a certificate will charge are an essential ingredient of the finding which the Commission must make in granting a certificate in two ways under Section 7(e), namely—
>
> (1) 'that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder'
>
> and
>
> (2) 'that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity' (Section 7(e))" (F. P. C. Brief, p. 14).

Similarly, the Commission's representations to the Congress made manifest its long-standing conception that the price ingredient of the certificate application was vital and that nothing took precedence thereover. See 1949 Annual Report, p. 114; 1950 *id.* pp. 115-116; 1951 *id.* p. 109; 1952 *id.* p. 110; 1953 *id.* p. 112; 1954 *id.* p. 127.

### 3. The Gulf Interstate and American Louisiana certifications—1953-54.

In two instances—pre-*Phillips*—the Commission was prevailed upon to digress from its basic price policy respecting certifications. Prior to 1953 the overwhelming majority of producer (unregulated) sales to pipeline companies (regulated) in southern Louisiana (the onshore area) were at prices at or below 10¢ per Mcf. Tennessee Gas

Transmission Co.—a principal New York supplier—paid uniformly 9.32¢; Transcontinental Gas Pipe Line Corp.—another principal New York supplier*—paid between 6.85¢ and 10¢ per Mcf.** In 1953 and early 1954, two "paper" pipelines (not in being) seeking FPC authorization for construction of new transmission systems, entered the market to acquire the large reserves of natural gas typically required by the Commission as a prerequisite for new pipeline certifications. They had executed purchase contracts to take gas from specified fields in southern Louisiana at prices ranging from 17¢ to 21¢ per Mcf.

The FPC granted the certifications—without price limitation or conditions—but not without dissent or observation of the potentials. In the latter respect, the Commission was prescient.

(1) In *Matter of Gulf Interstate Gas Company*, Docket No. G-2058, Opinion 251, 12 F. P. C. 116, on May 20, 1953 the Commission observed:

> ". . . These prices, particularly the initial price of 20 cents per M. c. f. [without tax] to be paid for gas from the Erath Field, represent the highest costs for purchased gas in the southwestern gas producing area of the United States that have been submitted to us for consideration in connection with any proposed pipeline project . . ." (12 F. P. C. 116, 123)

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* The third large New York-serving pipeline—Texas Eastern Transmission Company—did not begin purchases in this area until 1957. See *infra*, p. 42, ftn.*

** *Analysis of Initial Prices in Contracts for Interstate Gas Sales from Fields in Southern Louisiana* (Chapin), Exhibit 54, in *Matter of Champlin Oil & Refining Co.*, Docket No. G-9277—introduced March 18, 1959 at R. 4159; R. 4162-74. Prices herein designated include Louisiana taxes unless otherwise indicated.

In 1953 Tennessee purchased 55,637,575 Mcf in the Gulf Coast area of Louisiana or 5.4% of the total sales. Transcontinental purchased 48,474,864 Mcf, or 4.7% of the total. In 1957 Tennessee purchased 138,577,055 Mcf, or 8% of the total and Transcontinental 105,074,806 Mcf, or 6.1%. *Gas Distributors Information Service, Field Price Study of Natural Gas* (1958) Sched. 1.

"We do not regard the probable increase in cost to the consuming public as the only disadvantage inherent in the price levels which United Fuel Gas proposes to pay for the gas it will purchase. We must recognize the fact that the payment of higher prices for purchased gas in the circumstances here presented may serve to increase the prices which must be paid for gas by other pipeline companies which were dependent for their gas supplies under existing contracts for the purchase of gas in the same general area where United Fuel Gas will buy the gas which Gulf Interstate will transport for it.

"The question is a serious one and the record in this case does not show to what extent the unusually higher price to be paid by United Fuel Gas for natural gas in the field will or may affect the cost of gas to other pipeline companies" (12 F. P. C. 116, 125).

(2) In *Matter of American Louisiana Pipe Line Company*, Docket No. G-2306, Opinion 276, 6 PUR 3d 476 (a similar case) on October 1, 1954 the dissenting Commissioners (Chairman Kuykendall and Commissioner Digby) observed:

"We recognize that a [pipeline] certificate case is not a 'producer or a pipeline] rate case. Nevertheless, we are concerned about the producers' prices as shown in their contracts, which are among the highest, if not the highest, known to this Commission . . .".

"We do not pass on the reasonableness of the producers' rates, but we do say this problem, in this first, precedent setting, certificate case since the Phillips decision, deserves consideration which is not being given here, and cannot be given under the present state of the record." 6 PUR 3d 489.*

* Although the *American Louisiana* proceeding was actually decided post-*Phillips*, the record had been compiled pre-*Phillips* and the Commission treated of it as such (*i.e.*, no FPC jurisdiction over producers).

With these two certifications, the producer price holocaust began—as will be demonstrated (*infra*, paras. 5 and 6).

**4. June 7, 1954—Phillips.**

In one fell-swoop, on June 7, 1954, this Court plugged the *legal* gap through which the very first (and most important) element of cost in the interstate acquisition, transmission and distribution of natural gas had theretofore been escaping effective regulatory control. The independent producer supplying the product was for the first time subjected to the jurisdiction of the FPC under the Natural Gas Act. From that date forward, the power to condition *pipeline* certifications upon *pipeline* rate adjustments ceased to be the only avenue of FPC control over the rates paid for gas. From that date forward, the producer-exacter of the initial price would himself require certification as a condition precedent to the disposition of his product for interstate sale. From that date forward, the producer would be subject to Section 4 of the Act (any *changes* in existing rates to be filed with FPC and be subject to suspension and refund) and Section 5 of the Act (all charges subject to FPC adjustment downward—*in futuro*—upon findings of excessiveness). And in this connection, this Court said:

> "Regulation of the sales in interstate commerce for resale made by a so-called independent natural-gas producer is not essentially different from regulation of such sales when made by an affiliate of an interstate pipeline company. In both cases, the rates charged may have a direct and substantial effect on the price paid by the ultimate consumers. Protection of consumers against exploitation at the hands of natural-gas companies was the primary aim of the Natural Gas Act" (*Phillips Petroleum Co.* v. *State of Wisconsin*, 347 U. S. 672, 685 (1954)).

**5. Post-1954 independent producer rate regulation under Sections 4 and 5.**

A. The first important post-*Phillips* series of rate increase (Section 4) applications by independent producers which were processed through the hearing and determination stages, involved filings by Union Oil, Sun Oil, Bel Oil, Forest Oil, and others. Each sought to effect an increase from 9.79¢ per Mcf. to 17¢ for deliveries to Transcontinental from southern Louisiana fields. These increases in producer rates were to become effective November 1, 1954. However, they were suspended by FPC upon a finding that they might be unjust and unreasonable and hearings upon the lawfulness thereof were scheduled. Upon expiration of the suspension periods (maximum of five months) the increased rates went into effect under bond. The hearings commenced on November 1, 1955 and continued into 1956. The producers—in concert—refused to justify the increases by any demonstration of need therefor (*i.e.*, cost of service evidence) and chose to rest exclusively upon their demonstration (a) that their contracts with Transcontinental called for 17¢ for gas supplied after November 1, 1954, and (b) that the "field price" for gas (*i.e.*, unregulated prices in the area) equaled or exceeded the 17¢ level, viz. *American Louisiana, Gulf Interstate*, etc. On December 6, 1956, the Commission found *that* demonstration to be inadequate, disallowed the increases, and ordered the producers to refund to Transcontinental the amounts received to date in excess of the pre-existing rates (9.79¢). *Matter of Union Oil Company of California, et al.*, Docket Nos. 4331 *et al.*, Opinion 300, 16 F. P. C. 100. See also *Matter of Sun Oil Company, et al.*, Docket Nos. G-8288 *et al.* (order issued February 6, 1957), 17 F. P. C. 174; *Matter of Forest Oil Corporation*, Docket No. G-5510 (order issued April 26, 1957), 17 F. P. C. 586.

Petitions for review of these determinations were granted in part and denied in part by the Court of Appeals for the 5th Circuit, *sub nom. Bel Oil Corp.* v. *F. P. C.*, 255 F. 2d 548 (1958), *cert. denied* 358 U. S. 804; *Forest Oil Corp.* v. *F. P. C.*, ..... F. 2d ..... (CA 5th, Feb. 20, 1959). The propriety of FPC's evaluation of the inadequacy of the proof submitted to justify the price was confirmed by the Court, largely in reliance upon *City of Detroit* v. *F. P. C.*, 230 F. 2d 810 (CADC, 1955), *cert. denied*, 352 U. S. 829 (1956)—viz., field price data alone does not suffice. But, by reason of the Commission's neglect to formulate the standards which it will apply in evaluating the justness and reasonableness of producer rates—and to apprise the petitioners thereof—the Court remanded the cases to the Commission for further proceedings. The refund order was annulled. The increased rates remain under bond.

In point of fact, the Commission has not yet formulated those standards and, at this writing, no one knows how it will proceed in these cases or in this field.*

**B. Although, since 1954 several Section 5 proceedings** have been instituted by the Commission, to evaluate the propriety and lawfulness of independent producer rates, *not a single one has been considered by the Commission* (including the original *Phillips* proceeding (Docket No. G-1148) which grew out of this Court's decision of June 7, 1954!).** As of this writing, no one knows how the Com-

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* But *cf. Matter of Pan American Petroleum Corp.*, Docket No. G-8549, Opinion 310, April 4, 1958, 19 F. P. C. 463, wherein, largely in reliance upon field price data (comparable sales), the FPC determined 8.5¢ per Mcf. to be "just and reasonable" under Section 4; *Matter of William Negley*, 17 F. P. C. 550, 562 (1957)—12.25¢ determined to be "just and reasonable" in a Texas field. *The latter price is the highest yet so determined.*

** Examiner's Intermediate Decision rendered April 6, 1959 finding a unit cost of service of 11.662¢ per Mcf.

mission will proceed with respect to the independent producer under Section 5.*

In other words, the effectiveness of both Section 4 and Section 5 as devices for the protection of the ultimate consumer of natural gas, against price incursions of the independent producer, has yet to be demonstrated. In the meantime, those incursions proceed unabated as will be demonstrated (*infra*, paras. 6, 7 and 8).

**6. Post-1954 independent producer price regulation under Section 7 (pre-CATCO).**

A. *Purchases by Transcontinental.* The Commission's forebodings of the impact of its 1953-54 *American Louisiana* and *Gulf Interstate* pipeline certifications, condoning 17-21¢ producer prices (*supra*, para. 3), shortly proved to be more

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* The course of the Section 5 proceedings to which the Commission relegated the instant CATCO sales is illustrative (CATCO gas started to flow in June, 1958):

(1) Atlantic Refining Co.—Section 5 proceeding instituted Jan. 27, 1956 in Docket No. G-9283. Not yet noticed for hearing.

(2) Tidewater Oil Co.—Section 5 proceeding instituted Jan. 27, 1956 in Docket No. G-9283: by order of Sept. 27, 1958 assigned Docket No. G-13310. Staff presentations made in October 1957. Cost of service study reflected 6.63¢ per Mcf. to 7.95¢ per Mcf. CATCO sale *omitted*—Tidewater counsel stating he knew of "no way of handling the [CATCO] matter". Hearing to reconvene April 14, 1959 for presentation of Tidewater case (defense).

(3) Cities Service Production Co.—Section 5 proceeding instituted concurrently with CATCO order of June 24, 1957 in Docket No. G-12780. Company presented its case in November 1958, using as test year 1957 (thus excluding CATCO sales). Hearing to reconvene September 4, 1959.

(4) Continental Oil Co.—Section 5 proceeding instituted Jan. 27, 1956 in Docket No. G-9279. In November 1958 Staff presented its case using 1955 test year (thus also excluding CATCO sales). Proof reflects 8-9¢ per Mcf. cost of service and equivalent 1955 revenues. Company moved to dismiss for lack of proof of unjustness of rates. In its consideration of that motion, the Commission intimated that *intervenors* should bear a portion of the burden of proof of unreasonableness—decision deferred to permit thereof. The gambit was declined. The motion was renewed. It is now pending.

than warranted and in more ways than even the Commission anticipated. First and foremost, for *new* gas supplies all pipeline purchasers in southern Louisiana were confronted with demands for 17-21¢. No producer was going to be outdone by his *American Louisiana* and *Gulf Interstate* confrères if he could help it. Thus, the previously prevailing 10¢ price level evaporated and was supplanted by the new 17-21¢ price level. In the second place, and perhaps more importantly dollarwise, the *American Louisiana-Gulf Interstate* and concomitant sales triggered a large number of "favored nations", price redetermination and other types of price escalation clauses in outstanding contracts covering gas supplies *previously* dedicated to the interstate market at lower prices. For instance, Transcontinental's outstanding contracts with Union Oil, Sun Oil and others (independent producers) providing for 9.79¢ per Mcf. were immediately renegotiated to provide for a 17¢ per Mcf. price. The process was described by the Commission as follows:

> "During this period (1952-54) Union Oil and Louisiana Land Company (and others) conducted negotiations with Transcontinental looking toward an upward revision of the price. These negotiations were apparently motivated by operation of favored-nation clauses in the basic contract. The record shows that Transcontinental was faced with the fact that several other purchasers were offering to pay considerably more than the 9.79¢ interim rate. *Rates as high as 20¢ per Mcf were being offered in the area under favored-nation clauses. The applicants might demand that Transcontinental pay the 20¢ rate.* Nonetheless Transcontinental, because it felt it could not afford the 20¢ rate, resisted full increase, explored the possibility of acquiring supplies elsewhere and finally bargained for the 17¢ rate here involved." *Union Oil Company of California, et al.*, Docket No.

G-4331, et al., Opinion No. 300, 16 F. P. C. 100, 106 December 6, 1956. (Emphasis supplied.)

These negotiated increases gave rise to the first major, post-*Phillips*, inconclusive Section 4 producer rate increase proceedings (*supra*, para. 5). Simultaneously, Transcontinental entered into new-gas purchase contracts with other producers calling for initial prices at levels never thereafter below the 17¢ price. Producer applications to FPC for certification of these new sales provided the landmark FPC opinions, post-*Phillips*, under Section 7.

It being perfectly obvious that these 17¢ prices were solely attributable to Transcontinental's renegotiations which had been triggered by *American Louisiana* and *Gulf Interstate*, and that they had no other justification than that (except the producers' desire not to be paid less), the New York Commission and other representatives of the consumer (who bears the brunt of *all* costs, of course) objected to unconditional certification of these new purchases at that price level. We were willing to assume the propriety of the pre-existing 9.79¢ price level (though even that had never been determined to be "just and reasonable"), and condone issuance of producer certificates at that level. We were not willing to do so at the totally unjustified 17¢ level, the propriety of which the Commission was *then* investigating in Section 4 proceedings (*supra*, para. 5). These objections the Commission in its first major post-*Phillips* producer certifications, cast aside.

*In Matter of Anthony J. Tamborello, et al.*, Docket No. G-3045 *et al.*, Opinions Nos. 287, 11 PUR 3d 413 (1955), and No. 287-A, 15 F. P. C. 1 (1956), 12 PUR 3d 219, on November 28, 1955, the Commission granted unconditional producer certifications for Transcontinental's new-gas purchase (17¢) contracts. Opinion No. 287 pointed out:

1. That the Commission was by no means precluded in a Section 7 producer proceeding from inquiry into the propriety of the proposed prices;

2. That the imposition of a rate reduction condition in such a proceeding was sanctioned by administrative precedent and judicial approval, and was in accord with the policy of the Natural Gas Act as indicated by its legislative history; and

3. That the Commission had uniformly given favorable consideration to, and had actually employed the practice of imposing initial rate conditions where necessary to protect the public interest, all as evidenced by various decisions and by statements in its annual reports;

but concluded that, inasmuch as

(1) the interests of the consuming public against the exaction of excessive producer rates could be "adequately" protected by the institution of rate investigation proceedings under Section 5 of the Act;

(2) the estimated dollar increase in Transco's cost of service, resulting from the purchase being certified, *per se*, was negligible; and

(3) the resolution of rate issues would be a time-consuming process,

certificates should issue at the proposed contract prices.

The New York Commission accepted (ill-advisedly, it subsequently developed) and relied upon FPC's assurance that its Section 4 and Section 5 pursuits of producer price incursions would in fact prove "adequate".

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Thus did the 17¢ price for Transcontinental purchases (and all others) become the fixed floor in southern Louisi-

ana. See *Matter of Sinclair Oil and Gas Co., et al.*, Docket No. G-9049 *et al.*, 15 F. P. C. 665 (1956).

Depiction of the *Tamborello* determination would not be complete, however, without reference to *Matter of Cities Service Gas Co., et al.*, Docket Nos. G-2569 *et al.*, Opinion No. 288, 14 F. P. C. .....; 12 PUR 3d 3. In an opinion issued on the same day as was *Tamborello* (November 28, 1955), the Commission reviewed a request for its certification of a sale of gas by Signal Oil and Gas Co. to Cities Service Gas Co. in a field in southern Oklahoma, at an initial price of 12¢ per Mcf. It had been demonstrated that such a certification would disrupt the prevailing 10¢ price in the Oklahoma field, to the detriment of other purchasers therein (both interstate and intrastate—principally Oklahoma Natural Gas Co.). The applicant had offered no justification for the 12¢ price other than the fact that it had contracted therefor in arms'-length bargaining. The Commission certificated the sales, but only upon the condition that the initial price be revised downward to the 10¢ level. Said the Commission:

> "The evidence is both clear and uncontradicted with respect to the effect of granting Signal a certificate covering its proposed sale to Cities Service without imposition of the rate condition in question. The general area price for natural gas in the south-central region of Oklahoma would become 12 rather than 10 cents per Mcf, unless we later refused to permit rate-increase applications by other sellers in the area filed as a result of a 12-cent rate for the sale by Signal. Even such later action could be effective only with respect to interstate sales and, further, it would be difficult to justify such later refusal if we declined to act now with reference to the similar sale presented in this proceeding.

"Signal contends that the rate at which it proposes to sell natural gas to Cities Service is reasonable because it is the result of an arm's-length transaction negotiated under free competitive economic conditions. No defense of the proposed rate is made other than that contention. Under the less extensive jurisdiction believed to exist before the decision in the Phillips case, *supra*, p. 25, we exercised the authority to disallow rates which were not the result of arm's-length bargaining. The argument, made after that decision, that we must or may limit our inquiry with respect to the rates of an independent producer to the question of arm's length, is untenable. *The determination that a sale by an independent producer is at arm's length is not sufficient as the sole criterion in the determination of reasonableness of rates.*

"In this, a proceeding upon a certificate application, Signal as applicant-seller has the burden of proving all elements of its application so that we may conclude that the service proposed is or will be required by the present or future public convenience and necessity. *A vital element of such proof is concerned with the rates proposed*" (12 PUR 3d 3, 13-14).

* * * * * *

"It has been stated, rather than order a rate condition in this proceeding, that we may immediately order commencement of a rate-investigation proceeding under Section 5 (a) of the Natural Gas Act into Signal's rates and charges. This, of course, is true. However, *recourse to a proceeding under Section 5(a) in a situation of this nature has several critical disadvantages, all detrimental to the public interest.*

"Fundamental to the concept of rate regulation of the natural monopoly is the principle that the

burden of demonstrating the reasonableness of the rates and charges assessed on and to be collected from rate payers should vest primarily in the proponent of the rate. Many organic statutes of regulatory commissions hold that this burden never shifts, regardless whether the assailed rates are effective or not. Under the Natural Gas Act, however, once a schedule of rates and charges has been filed and becomes effective, the burden of going forward with the evidence at least is borne by the complainant alleging an unjust preference, prejudice or discrimination or by the Commission commencing an investigation on its own motion. It becomes clear, therefore, that in order effectively to attack a rate or a charge which has been filed and has become effective through operation of law, an unnecessarily difficult and complex procedure must be followed to the disadvantage of the public interest.

*"A proceeding under Section 5(a), moreover, is certain to entail a long delay in terms of time of final decision, and there is no way of undoing the damage done to the public in the interim period.* A proceeding under Section 5(a) is, itself, more time consuming than the course of action we employ here, thus, administratively more difficult and would confront us with a multiplicity of actions, all brought on by our failure to act in the first instance" (12 PUR 3d 3, 15). (Emphasis supplied.)

Upon review, this never-thereafter-to-be-repeated exercise of FPC responsibility under Section 7 was sustained by the courts, *sub nom., Signal Oil & Gas Co.* v. *F. P. C.*, 238 F. 2d 771 (CA 3rd 1956), *cert. denied*, 353 U. S. 923 (1957), upon the ground that *applicant* had neither established the propriety of the 12¢ price nor the impropriety of the 10¢ condition. Though the application of the *Signal*

doctrine in southern Louisiana and other areas has repeatedly been sought, the FPC has never seen fit to repeat it.*

* The aftermath of *Signal* in the Oklahoma fields is ironic. Barely one year after its refusal to condone an unjustified producer price rise to 12¢ in that area, the FPC (reversing its presiding examiner who had recommended a *Signal*-type certification) issued unconditional certificates for sales at 13.9¢ per Mcf. and higher. *Matter of Natural Gas Pipeline Company of America*, Docket No. G-4280, Opinion 299, 16 F. P. C. 80, 16 PUR 3d 277, December 4, 1956. Oklahoma Natural Gas Company, the successful intervenor in *Signal* (even more aggrieved here) petitioned for review, contending that Section 4 proscribes unjust and unreasonable rates and the instant 13.9 cent-plus price had not been demonstrated to be "just and reasonable". The DC Circuit affirmed (2 to 1), stating *inter alia* that "The Commission cannot be required to convert every certificate proceeding into a rate proceeding." *Oklahoma Nat. Gas Co.* v. *F. P. C.*, 257 F. 2d 634 (1958). This Court granted certiorari (Oct. Term, 1958, No. 288, November 10, 1958). Petitioner's brief was filed and the case was scheduled for argument when abruptly, on February 20, 1959, *petitioner* filed a motion to dismiss! The motion speaks volumes:

> "Competitive conditions for the purchase of gas in southern Oklahoma have increased the price of gas to the extent that in order to continue to purchase gas, Petitioner has found it necessary to contract to pay a price for substantial reserves of gas in that area which is in excess of the price being paid under the contracts in issue in the cause here under review. As Petitioner has pointed out throughout these proceedings, it must purchase gas continuously in order to be able to continue to serve its customers and when faced with the decision of continuing to contest the price being paid to the producer-applicant Respondents herein or purchasing substantial reserves of gas, it determined in this instance that, as a matter of its best business judgment, it must meet the higher price and purchase such reserves. The loss of these large reserves of gas to other competitive purchasers offering higher prices would seriously affect Petitioner's ability to serve its customers in years to come. Petitioner has now agreed to pay a price for gas in southern Oklahoma which exceeds the price being paid to the producer-applicant Respondents herein [16.8¢ per Mcf.]. Therefore, Petitioner states that the relief sought herein, in all of the circumstances existing in this case, would serve no useful purpose. In view of the foregoing and inasmuch as the Petition for Writ of Certiorari was predicated upon there being a substantial question as to the reasonableness of the rates proposed to be paid for natural gas, arising principally from the fact that the rates proposed were substantially in excess of the prevailing rate in the area which resulted in serious detriment to the Petitioner, and this is no longer true, this cause is now moot."

In sequence, the DC Circuit, upon its own motion, on March 18, 1959 ordered the parties in this proceeding to show cause why Oklahoma's 1958 cause before it should not be deemed equally "moot". (That cause is better described as "suppressed" by reason of capitulation to cold, unrestrained (by FPC) economics and at a cost of millions of dollars to the hapless consumer (see Oklahoma's Sup. Ct. brief, pp. 6-7, ftn. 5).

B. *Purchases by Tennessee.* With Transcontinental leading the 1954-56 southern Louisiana purchase price parade from 10¢ to 17¢, Tennessee Gas Transmission Company, the other major New York-serving pipeline in the area followed along. Indeed, it had no choice. The climb from its pre-1954 uniform level of 9.32¢ per Mcf to its pre-CATCO (1956) high of 18¢ per Mcf occurred slightly more gradually, though with similarly undeviating line of assent. See e.g. *Matter of Alabama-Tennessee Natural Gas Company, et al.*, Docket G-2534, (1955).

From a "me too" follower, however, Tennessee suddenly became the chief perpetrator of the next (the instant) precipitous boost of the price level of natural gas in southern Louisiana—this time from 18¢ to 22.4¢.

**7. CATCO—June 24, 1957.**

Such is the background of the instant determination. Its epilogue—which is even more important—follows.

**8. Post-1957 independent producer price regulation under Section 7.**

The 22.4¢ initial price level *CATCO* established and condoned shortly washed right up on-shore and became the fixed floor for subsequent pipeline-producer negotiations for gas, off-shore and on-shore, in southern Louisiana. *Matter of Transcontinental Gas Pipe Line Corp.*, Docket No. G-13143, Opinion 315, 20 F. P. C. 264, Sept. 4, 1958, *infra*, par. 8, case (7).

During the pendency of *CATCO* on review and prior to the Third Circuit's June 30, 1958 pronouncement thereupon, the FPC devoted an inordinate amount of attention and consideration to a series of relatively unimportant, uncontested producer certification cases which, while they too broke through the pre-CATCO prevailing price level,

did not (with two exceptions) surpass the CATCO 22.4¢ pinnacle. Therein, cumulatively, the Commission evolved new "standards" for the evaluation of new-high-price certificate applications and new procedural (burden of proof) rules of the game. Both had the effect of simplifying the task of the new-high applicant; and of avoiding the occasion for repetition of the CATCO capitulation-to-threat spectacle. Both had the effect of making the price-conscious intervenor's task virtually impossible; and setting the stage for and expediting the next and succeeding important piercings of the initial price ceiling. Both had the effect of enabling the same Commission—which had twice found it impossible (in the absence of threats) to certify a 22.4¢ price (without demonstrated concomitant triggering consequence)—to certify without qualms, upon identical proof, one year later, a 23.3¢ price with an immediate $5 million triggering effect and an immediate multi-million dollar increase for the pipeline-purchaser's customers. The sequence of cases follows:

(1) *Matter of Hope Nat. Gas Co.*, Docket No. G-12571, 19 F. P. C. 405, March 31, 1958—certification of West Virginia sales at 7¢ higher than the prevailing level, without full hearing, in the face of FPC Staff insistence of lack of demonstration of public convenience and necessity therefor. There was no other opposition.

"We are of the view that if the applicant proves there is a market for the gas at the proposed price and that the project is economically feasible at the proposed price (both market and economic feasibility being factors which we consider in determining public convenience and necessity) that it has sustained its burden of going forward with the evidence, and in the absence of evidence showing that the proposed price or rate adversely affect the public convenience

and necessity, the applicant has made out a prima facie case, and a certificate should issue to it" 19 F. P. C. 405, 407.

*With that, there is no longer any need for CATCO-like threats, of course.*

Commissioner Connole dissented, 19 F. P. C. 405, 410.

(2) *Matter of Seaboard Oil Co.*, Docket No. G-11970, Opinion 309, 19 F. P. C. 416, March 31, 1958—Louisiana producers obtain certification of 19.5¢ sales in the face of FPC Staff demand for an 18¢ condition. The Commission (a) found no evidence to support the requested condition and placed the burden of proof to support the reasonableness of such a condition upon the *proponent* thereof; (b) "distinguished" *Signal;* (c) found no price disruption to ensue from the 19.5¢ initial rate (citing *Gulf Interstate* and progeny, *i.e.*, the damage was already done); (d) found no deleterious effects upon the pipeline-purchaser's customers; (e) relegated all producer rate matters to Section 5 proceedings, to save time and administrative effort; (f) castigated its Staff for bothering with comparable field price studies (reflecting a great predominance of sales at lower prices) which were found useless;* and (g) found it impossible to select a lower price level for conditioning purposes—all the while giving lip service to its powers and duty to do so under circumstances which "may exist".

Specifically, the Commission held forth the prospect of initial price conditioned certification if the proposed price (1) would increase costs of customers of the pipeline purchaser, (2) compel other pipelines to pay more for gas in the area, or (3) set a new high price plateau (19 F. P. C. 419, 424).

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* *Cf.* FPC reliance thereupon in fixing "just and reasonable" rates under Section 4. *City of Detroit* v. *F. P. C.*, 230 F. 2d 810 (CADC, 1955), *cert. denied* 352 U. S. 829; *Matter of Pan American Petroleum Corp.*, Opinion 310, 19 F. P. C. 463 (1958).

Commissioner Connole dissented, vigorously. 19 F. P. C. 427. No participant in the proceeding was in a position to initiate review proceedings.

(3) *Matter of Southern Nat. Gas Co.*, Docket No. G-13082, 19 F. P. C. 558, April 18, 1958—Louisiana producers obtain certification of *22.8¢* sales, after an abridged hearing, in the absence of opposition. The Commission observed in passing:

> "These proposed prices will be among the highest to be paid for natural gas in the southern Louisiana area." 19 F. P. C. 558, 559.

Commissioner Connole dissented. 19 F. P. C. 561.

(4) *Matter of Sunray Mid-Continent Oil Co.*, Docket No. G-12211, 19 F. P. C. 618, May 9, 1958—Louisiana producers obtain certification of sales at 21.5¢, notwithstanding FPC Staff request for an 18¢ condition, citing *Seaboard*, Opinion 309. There was no other opposition. Commissioner Connole dissented 19 F. P. C. 620.

(5) *Matter of Superior Oil Co.*, Docket No. G-12121, 19 F. P. C. 637, May 9, 1958—Louisiana producers obtain certification of sales at 21.3¢ notwithstanding staff objections. Again, no one could petition for review. Again Commissioner Connole dissented, in part as follows (19 F. P. C. 639-40):

> "To me it seems so obvious as to defy argument that the prime cause for the abrupt and continuing increase in the price at which gas is being brought under contract in south Louisiana (and to a somewhat lesser extent elsewhere) is the lack of a meaningful administrative regulation of the prices themselves. In the absence of a willingness or ability on the part of the industry to demonstrate where the range of reasonableness is, and lacking the deterrent of a refusal by us to accept high prices in initial contracts, buyers of gas have little choice if the gas that is becoming available is to be obtained.

This proceeding is but another turn of the wheel. Once again a buyer has to meet the highest price being paid by any other pipeline if it hopes to do business with the producers involved. And once again an opportunity to brake the headlong rush is lost.

This proceeding also illustrates the rapidity and the extent of the increases in prices for new gas purchases in the south Louisiana area. In the six months during which this contract was under negotiation the highest price being paid in the area was bid from 17¢ up to 21.3¢ or an increase of *twenty-five per cent in six months!* And this is in an area where some 373 million Mcf were purchased by interstate pipelines in 1956!

This record shows only 8 contracts out of 88 in the area at a price of 21¢, including taxes, Exhibit No. 4 discloses that 85 per cent of the contracts are at levels of 18¢ and less. Reference to the annual reports, Form 2, filed by pipelines with this Commission and part of our public records discloses that for the last calendar year for which data is available (1956) over 82 per cent of the 373 million Mcf of natural gas bought in the area by those lines was bought at prices of 17¢ per Mcf or less.

I say again what I said in *Re Seaboard Oil Company*, et al., G-11970, et al., Opinion No. 309, 19 F. P. C. 416: 'During this difficult period some workable, practical deterrent must be placed on the rate of increase to avoid permitting prices to rise by sheer momentum to unknown altitudes where they may or may not be able to survive the test of reasonableness when it is devised.' This record, like *Seaboard*, presents an opportunity to deter that increase. And, like *Seaboard*, it contains nothing to support the assertion that the public convenience and necessity requires this sale at 21.3¢, except self-serving contentions and the admission of helplessness that I quote at the beginning.

This record contains ample evidence showing the price at which a typical new sale in the area could reasonably be expected to occur. It contains nothing of substance to demonstrate why this sale is different. Accordingly, it will not support an assertion that the public convenience and necessity requires the authorization of this sale at the proposed price. To so much of this order that holds otherwise, therefore, I dissent."

(6) *Matter of United Gas Pipe Line Co.*, Docket No. G-12712, 19 F. P. C. 931, June 12, 1958—Louisiana producers obtain certification of sales at *22.5¢*. Staff's contention for conditions restricting initial price to 18¢ were discarded. There was no other opposition. Commissioner Connole dissented. 19 F. P. C. 932.

(7) *Matter of Transcontinental Gas Pipe Line Corp.*, Docket Nos. G-13143 et al., Opinion 315, 20 F. P. C. 264, September 4, 1958—twenty-five of Louisiana's major producers obtain unconditional certifications for the sale of gas to Transcontinental at 22.4 to *23.3¢* for Mcf. This was the first major certification case to follow the *CATCO* reversal by the Third Circuit—the implications of which the Commission noted but largely ignored.

The producers had proven their contracts, their ability to supply and Transco's willingness to buy. Such is all that is necessary, the Commission held, in the absence of proof (which *intervenors* must supply) of the unreasonableness of the price. This, in the face of the demonstrated facts that:

(1) The purchase would immediately trigger Transco's existing gas acquisition contracts at a cost of some $5 million annually.

(2) It would prompt increases for Transco's distributor customers of 2¢ immediately; undoubtedly more later.

(3) The 23.3¢ price established a new high in the area. (Although the contract price exceeded any

theretofore certificated, the Commission nevertheless found no field price disruption, ostensibly because others had already contracted for more.)*

The Commission expressed its distaste for and abhorrence of becoming a "kind of peace-time OPA" for the natural gas producing industry (20 F. P. C. 264, 273) and concluded:

> "Certainly in the present context such factors as the assurance of supply in meeting urgent and extensive demands on Transco's system can reasonably be found to outweigh such undesirable aspects of the prices proposed by the producers as may exist in this case, where as here, *the price is reasonably justified and there is no substantial showing of adverse effects from such prices on the public.*" (!) 20 F. P. C. 264, 283.

Commissioner Connole's dissent here is a classic. 20 F. P. C. 288-302.** In this proceeding, the consumer voice was heard and this determination is on review, *sub nom. United Gas Improvement Co. and Philadelphia Electric Co.* v. *F. P. C.*, (CA 3rd, No. 12,797); *Public Service Commission of New York* v. *F. P. C.*, (CA 3rd, No. 12,805).

* * * * * *

And the upward producer price spiral continues. *Matter of Sun Oil Co.*, G-15122, March 3, 1959—examiner recommends certification of Louisiana producer sales at 23.8¢ per Mcf. to United Gas Pipe Line Co. (holding costs of production to be irrelevant in a producer case); *Matter of*

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* Texas Eastern Transmission Co. had previously jumped into the southern Louisiana market with a 23.9¢ splash. FPC Docket No. G-12446, pending.

** See also *Threshold Prices: A Practical Proposal for Producer Pricing* (Connole) 63 Public Utilities Fortnightly 23, 26-27, Jan. 1, 1959.

*Trunkline Gas Co.*, Docket No. G-15394 et al.—*24.05¢* in the offing.*

## Statistical Summary.

The impact of the 120% increase (10¢-22¢) in the predominant Louisiana new gas purchase contracts 1954-57, is partially reflected in the following statistical depiction of the concomitant 56% increase in the *average* cost of gas delivered to interstate pipelines in that area.** The latter is directly and exclusively attributable to the former—time lag largely accounts for the discrepancy.

THE FIELD PRICE OF GAS, 1953-1957
(interstate only)

| | Louisiana | | |
|---|---|---|---|
| | MMcf | Dollars (000's) | ¢/Mcf |
| 1953 | 964,619 | $ 87,610 | 9.1¢ |
| 1954 | 1,038,070 | 100,821 | 9.7 |
| 1955 | 1,248,011 | 139,628 | 11.2 |
| 1956 | 1,431,656 | 177,783 | 12.4 |
| 1957 | 1,631,150 | 231,164 | 14.2 |

**9. The Commission's report to Congress—January 7, 1959.**

The Commission's 1958 Annual Report seeks amendment of ". . . the pertinent sections of the Natural Gas

* Initial price considerations in a producer certificate case have fallen to such a low ebb, in the Commission's conception, that the New York PSC has been barred from participation in this proceeding. PSC's concern with the new high price certification proposed herein for Texas and Louisiana areas, and the impact thereof upon New York-serving pipelines already there, is no longer deemed sufficient even to qualify the New York consumers' representative as "an *interested* State commission" (Nat. Gas Act, §15(a); FPC Rules §§1.8 and 1.37(f) for purposes of *intervention* before FPC! See orders issued in this Docket November 14, 1958, January 30, 1959 and March 26, 1959. Amazingly, the examiner recommended *denial* of the application. Intermediate Decision issued April 1, 1959.

** Source: FPC Report, issued November 12, 1958

Act . . . to provide for (1) elimination of any requirement for certificates of public convenience and necessity for producers of natural gas" (p. 15). It also contains the following statement:

> "In issuing certificates for new pipelines and extensions of existing pipelines into new market areas, and for independent producers to provide interstate natural gas service, the Commission generally has followed the practice of giving consideration to the proposed rates. For certificate cases in which the proposed rates are subject to Commission jurisdiction, a review is made to determine whether rate proposals are consistent with the statutory requirements of reasonableness and nondiscrimination. As a result, the Commission in several instances has conditioned the certificates to assure that the services authorized will be rendered initially under reasonable rates" (p. 78).

* * * * * *

Such is the aftermath of the Commission's CATCO determination. Its demotion of the initial price issue in a producer certificate proceeding to a status of secondary import (in response to threat and cajolery), prefaced the subsequent relegation of that issue to oblivion. The demise of the issue occurred under a procedural onslaught conceived, devised and launched by the Commission (i.e., the unassailable, automatic-*prima-facie*-case thesis) while CATCO was pending on review in the Court below. Contemporaneous protestations by the Commission of lingering care and concern for the subject have since been demonstrated to lack any semblance of sincerity. ***Matter of Transcontinental Gas Pipe Line Corp.***, Docket Nos. G-13143 *et al.*, Opinion 315, 20 F. P. C. 264 (1958). Producer certificate regulation has emerged as a colossal farce.

Each and every post-CATCO, southern Louisiana certificated producer price in excess of the 17-18 cent level, has as its origin an FPC determination founded upon the same basic deficiency, the same error of law, the same abuse of authority as is at the root of the CATCO determination—i.e. the absolution of the producer applicant from any obligation to explain, rationalize or justify his price as a condition of the entry of his product into the interstate market. *That* is the vitally important aspect of the case before this Court. The other—the authenticity, propriety and import, in the context of a producer Section 7 proceeding, or threats to withhold gas from the interstate market—while important here, has since June 24, 1957 become one that is of little or no moment. Such tactics—such utterances—are no longer in vogue. They have since been rendered totally unnecessary and passé.*

## Summary of Argument.

In its two earlier orders herein, the Commission expressly and correctly observed that the record was inadequate to support a conclusion that public convenience and necessity required, or even permitted, certification of these sales at the initial price proposed (R. 837, 906). That was within its province. Upon this record, that was its statutory obligation. On June 24, 1957, on the identical record, without an additional word of testimony or any additional evidence whatever, *and without altering those findings*, the Commission concluded to certificate the sales anyway—

* But cf. remarks by Transco counsel before the Commission on August 1, 1958 in *Matter of Transcontinental Gas Pipe Line Co.*, Docket Nos. G-13143 *et al.*, *supra:* "Counsel for the New York Commission has spoken rather eloquently of the dire consequences of the prices of gas involved in these contracts. I just wonder which is the most disastrous—these prices or no gas."

without limitation or condition. In so doing it based its action upon its *assumptions* (1) that the CATCO supply of gas was urgently required by the public to be served upon completion of Tennessee's expansion program (measuring that requirement without the aid of any evidence and without considering the element of cost) and (2) that unless certificates of public convenience and necessity were issued upon the CATCO terms, this supply of gas would be lost to Tennessee and withdrawn from the interstate market (measuring the likelihood of that happenstance solely upon representations relayed second hand by Tennessee and equivocal, though clear enough utterances of counsel upon oral argument).

The issuance of unqualified certificates of public convenience and necessity to these applicants for these sales, under the circumstances, was erroneous as a matter of law. The denomination by the Court below of that error as in excess of the Commission's "statutory jurisdiction" was clearly apt and correct. The Commission simply lacked statutory authority or discretion so to act.

## ARGUMENT.

### POINT I.

**Consideration of the impact of initial price is the *sine qua non* of any determination of whether proposed sales of natural gas should be certificated for the interstate market. It is *the* "prime determinant."**

The Natural Gas Act in its design to protect the consumer from unwarranted price exactions, however and whenever attempted (*F. P. C.* v. *Hope Natural Gas Co.*, 320 U. S. 591, 612 (1944); *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672, 685 (1944); *City of Detroit* v. *F. P. C.*,

230 F. 2d 810, 815, 816, 818 (CA D. C., 1955) *cert. den.* 352 U. S. 829), and the record, briefs and decision of the court in *Signal Oil and Gas Co.* v. *F. P. C.*, 238 F. 2d 771 (CA 3rd, 1956) *cert. den.* 353 U. S. 923, make this virtually a self-evident proposition. As a practical matter, producer sale proposals seldom involve any other factor of materiality for consideration by the Commission under Section 7. The sale contracts having been executed, the gas supply having been confirmed, the producer has evidenced his readiness and ability to perform before he ever steps foot into the Commission's hearing rooms. The only issue left, in most instances, is the matter of price.

And (1) such sales having been expressly forbidden except upon express approval of the Commission; (2) the Commission having been directed by law to determine whether public convenience and necessity require any such proposed sale; (3) the Commission having been (a) expressly adjured by law to limit its certifications "to the extent authorized" thereby and (b) expressly authorized by Congress to impose price conditions upon its authorizations for such sales, both in furtherance of its basic obligation to the consumer; (4) the Commission being otherwise powerless to prevent payment of the initial price proposed or to effect any reduction thereof subsequently,* except after protracted proceedings under Section 5 of the Act in which no means is afforded of effecting repayment or reimbursement of sums ultimately found to be excessive; (5) the Commission and everyone else being acutely aware from vivid experience that its condonation, in a Section 7 proceeding, of the initial new-high price proposed in a *single* producer-pipeline pur-

* An initial price filing—not constituting a "change"—cannot be suspended or made the subject of inquiry *per se* under Section 4: FPC Rules, §2.4 (d). The Commission will not permit of "collateral attack" upon prices paid producers by a pipeline in a pipeline rate case. *Matter of Tennessee Gas Transmission Company*, Docket No. G-5259, order issued July 14, 1955.

chase contract, fixes irrevocably an immutable price floor for the production area, below which no future sales or acquisitions can or will be effected; (6) the Commission and everyone else being acutely aware that a *single* new-high certification will or may serve to trigger all sorts of "favored-nation", price redetermination and other price escalation clauses in existing gas purchase contracts and thus occasion *en masse* rate increases which the Commission may forestall by suspension only momentarily under Section 4; and, finally (7) the Commission and everyone else being acutely aware of the utter breakdown of its price-rate regulatory controls provided by Sections 4 and 5 (no "just and reasonable" rate for a major producer having yet been determined under either rate provision)—it would seem readily apparent that the Commission is under a continuing duty to scrutinize and evaluate most carefully the initial price proposed in each and every Section 7 producer application. Unless it is affirmatively established therein that the proposed sale *at such proposed initial price* is, in all respects, reasonably in the public interest, the Commission is required by law either (1) to deny the application *in toto* or (2) to limit or condition the certificate to be issued upon reduction of the initial price to a level which the Commission has reason to believe will be without deleterious effect upon the interstate market, the interstate pipelines and, through them, the ultimate intrastate consumers. To repeat, these, it seems to us, are obvious truisms.

Nothing contained in any judicial pronouncement, including *Oklahoma Natural Gas Co.* v. *F. P. C.*, 257 F. 2d 634 (CA DC, 1958); *cert. dismissed* Feb. 20, 1959 (see *supra*, p. 35, ftn.*) or *Florida Economic Advisory Council* v. *F. P. C.*, 251 F. 2d 643 (CA DC, 1957), *cert. denied* 356 U. S. 959 (1958) holds to the contrary.

*Florida* was a proceeding instituted by an association of purveyors of competitive fuels, who opposed the introduction of natural gas into the State of Florida. They sought review of an FPC determination certificating natural gas pipeline expansion into that state. In *other* dockets, the FPC certificated the producer sales to be made to the pipeline involved. In response to the petitioners' assertion of error on the part of FPC in not determining the "just and reasonable" producer rate in the pipeline proceeding (and, hopefully, fixing it so high as to render it non-competitive with fuel oil in Florida), the Court observed that: ". . . the Commission did not abuse its discretion in declining to consider the matter in the instant proceeding" (251 F. 2d at p. 646).

In *Oklahoma* a competitor pipeline purchaser in a gas field objected to FPC's unconditional certification of another's acquisition of gas from adjoining fields at prices higher than the going price in the area. It sought the determination of the Court of Appeals that Section 4 of the Natural Gas Act, with its "just and reasonable" rate standard, was, in legal effect, an integral part of Section 7 with (and superseding) its "public convenience and necessity" price standard. It too was told by the Court that: "The Commission cannot be required to convert every certificate proceeding into a rate proceeding" 257 F. 2d at p. 640.

We here dispute neither observation. It is *not* our contention—nor is it the tenor of the decision below—that it is incumbent upon the Commission to make a determination of "just and reasonable" rates as a prerequisite to the issuance of producer certificates—the whole thrust of petitioners' briefs herein to the contrary notwithstanding.*

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* Tenn. Br., pp. 2 (Question 1), 11, 12, 14-15, 20-22, 31, 37. CATCO Br., pp. 2 (Question 1), 10, 18, 26.

If rate regulation of producers had progressed beyond the preliminary, formative stage—and it might have if the Commission had received any cooperation from the producers in this respect during the past five years—that process might be available and practical in a Section 7 proceeding. It has not. It is not. We do not seek the impossible or the impractical. We do not seek to stultify the certificate process.

By the same token, however, we think that the lack of progress by the Commission in the discharge of its "just and reasonable" rate determinating obligations, under Sections 4 and 5, serves to emphasize the absolute necessity for its responsible reaction to initial price proposals of producer applicants under Section 7 which, its inquiry demonstrates, inevitably will be deleterious in their impact upon the second and each successive link in the interstate gas distribution chain. This, we think Section 7 requires anyway. The persistent Section 4 and Section 5 "just and reasonable" producer rate morass should provide emphatic impetus to rigorous discharge by the Commission of its responsibilities in each producer initial price certificate application it considers. And this, we think this Court should make abundantly plain to the Commission in its disposition of this case.

Herein, initially the Commission did demonstrate full cognizance of its price prerogatives and duties in a Section 7 proceeding and exercised them fairly and forcefully. Its April 22 order states:

> ". . . The importance of this issue in certificating this sale cannot easily be overemphasized. This is the largest reserve ever committed to one sale. This is the first sale from the newly developed offshore fields from which large proportions of future gas supplies will be taken. This is the highest price level

at which the sale of gas to Tennessee Gas has been proposed.

Those factors make it abundantly evident that, in the public interest, this crucial sale should not be permanently certificated unless the rate level has been shown to be in the public interest. See *Cities Service Gas Co., Signal Oil and Gas Co.*, 14 F. P. C. , opinion No. 288, Nos. G-2569, G-2570, November 28, 1955, affirmed as *Signal Oil and Gas Co.* v. *F. P. C.*, 238 F. 2d 771 (CA 3), certiorari denied, 353 U. S. 923" (R. 835).

In its May 20 order the Commission imposed the 18 cent initial price condition upon these sales in clear reaffirmation and application of the judicially blessed *Signal* doctrine. It also reiterated the deficiencies of the present record:

> "As we have already stated, the record does not contain sufficient evidence on which to base a finding that the public convenience and necessity requires the sale of the gas *at that particular rate level.*" (R. 904, emphasis added.)

Under the circumstances, and under our conception of Section 7, the Commission had only one other alternative—viz. ". . . otherwise such application shall be denied." In its June 24, 1957 determination and order, however, the Commission did not exercise that alternative; it did not discharge its price limiting obligation; it did not exercise its price conditioning authority. Instead it summarily concluded that the record did, after all, support the determinations that:

> (a) ". . . the applicant is able and willing properly to do the acts and to perform the service proposed . . ." [conceded];
>
> (b) ". . . the applicant is able and willing . . . to conform to the provisions of [the Act] and the

requirements, rules, and regulations of the Commission . . ." [*quaere*, in the light of this record];

(c) "and that the proposed . . . sale . . . is or will be required by the present or future public convenience and necessity" [definitely *not*, at the initial price herein proposed].

The conclusion was founded upon (1) an assumed supervening necessity on the part of the public for gas at any price, and (2) a threat (unrealistic and unreasonable *per se*) to terminate the underlying contracts—both factors being deemed adequate bases for dispensing with further (any) concomitant consideration of the "prime determinant"—price. This we assert was fundamental error.

## POINT II.

**1. Threats to withhold gas from the interstate market add nothing to a Section 7 proceeding. Unless the requirements of that section are met in full, the application to introduce the gas into that market "shall be denied."**

**2. In any event, this particular threat was unrealistic, unreasonable, and wholly unsupported and hence afforded no basis for anything, much less for dispensing with the "prime determinant"—price.**

We are fully cognizant of what may be deemed the Commission's general responsibility (*to be discharged within the confines of its statutory authority*) to so supervise the interstate natural gas industry that there will be adequate supplies of gas to supply consumer needs—i.e. *reasonable* supplies to supply *reasonable* needs and at *reasonable* prices. But, under the law, in the discharge of its duties

and responsibilities in Section 7 proceedings, the reasonableness of all three—supply, need and price—must be affirmatively demonstrated, precedent to entry of the gas involved into the interstate market, else (1) the permission to enter must be limited or conditioned in such a manner as will satisfy any evidentiary or other defects in the presentation or proposal, or (2) denied. By no other means may compliance with the law be effected. Hence the threat —at whatever stage uttered—to withdraw an application or to cancel a contract commitment or to divert the tendered gas elsewhere (all concededly within the applicant's power in each instance) adds absolutely nothing to a Section 7 proceeding and, perforce, should weigh absolutely *nil* upon the collective minds of those charged with the administration of the Natural Gas Act.

From its inception, that Act has clearly contemplated and relied upon *economic* compulsion or inspiration as sufficient inducement for the entry into the interstate market of reasonable quantities of natural gas. No means whereby the Commission may compel such devotion of that commodity has ever been prescribed by the Act. On the contrary, such disposition is expressly prohibited except under the statutorily prescribed requirements and conditions, which were carefully designed for the protection of those to be served. Should it ever develop (and we deny that it has) that such extra-statutory, economic impetus proves inadequate, and that further inspiration must be afforded to encourage production and delivery of additional supplies, Congress, not the Commission will have to face up to the problem. In the meantime, the Commission is not in a position to pre-empt that Congressional prerogative or to bargain away its statutory functions and duties with individual producers who fail to measure up to the require-

ments of the present law and attempt to evade them by threat, trick, cajolery or subterfuge.

The instant threat should have been ignored for yet another reason. It was most unrealistic. The CATCO applicants carefully avoided placing themselves in a position of having to substantiate it. *They* did not apply to the Commission for rehearing of its May 20 order—as they had done with respect to its April 22 order; *they* did not present any sworn statement in support of their threat to withdraw. Instead, the application for rehearing which resulted in the June 24 order was made by Tennessee—in the form of an hearsay allegation, based on statements made to Tennessee by the CATCO applicants that they would not comply with the Commission's May 20 conditions and would terminate the contracts unless the conditions were withdrawn. This was not evidence that the contracts would actually be terminated—it was pure hearsay, and: "Mere uncorroborated hearsay or rumor does not constitute substantial evidence." *Consolidated Edison Co.* v. *Labor Board,* 305 U. S. 197, 230.

Having refrained from making any direct representation to the Commission that they would cancel the contracts unless relieved from the conditions of the May 20 order, the CATCO applicants proceeded to the oral argument which constituted the "rehearing." The record of that rehearing is not before the Court, since it contained no *evidence,* but merely the *arguments* of counsel. But even in that discussion, the CATCO attorneys with careful circumspection avoided any definitive statement of the determination of their clients to withdraw this supply of gas from Tennessee and the interstate market. Each one indicated that the matter would have to be taken up by "the Board of Directors" or the final decision would have to be made by "management."

There is thus not a scintilla of proof in this record that the CATCO applicants (1) *could*, or (2) actually *would* take this drastic course. In order to carry out their unsupported threats—in order to be *able* to do so—they would have had to find an *intrastate* market for this vast supply of gas in the State of Louisiana. There is no evidence that any substantial part of this gas could be sold locally under conditions equally or more advantageous to the CATCO applicants than those provided by the terms of the Commission's May 20 order. On the contrary, as Commissioner Connole said: ". . . the very quantity of offshore gas affected by this decision makes it clear that the only practical market for gas of this kind for years to come is to the large consuming areas served by the long haul interstate pipelines" (R. 932). Any intimation that these wells would be capped or that the gas would be released to blow tremendous bubbles in the waters of the Gulf of Mexico, instead of being disposed of in the interstate market at 18 cents per Mfc, is sheer nonsense. Millions of dollars had been expended in exploration, drilling and recovery. The investment was providing no return. At 18 cents, the gas reserves here committed equate to $360 million! Furthermore, the Commission was told, the leaseholds had to be in production by 1958 or be in jeopardy (R. 26a-27a, 78a).

So much for the first of the two motivations and purported justifications for the Commission's final determination herein.

## POINT III.

**1. The need for gas cannot be evaluated separately or divorced from price.**

**2. The need for gas to supply proposed pipeline expansion requirements provides no basis for dispensing with further consideration of the "prime determinant"—price. If anything, it renders it even more imperative that unjustified price exactions be precluded at the threshold of the interstate transmission process.**

**3. In any event, the demonstration of such need in this record is wholly insubstantial.**

> "... we are moved by the primary consideration that *the public served through the Tennessee Gas system is greatly in need of increased supplies of gas.* ... We are of the opinion that, in the circumstances of this case, in view of *the great demand for gas by customers of Tennessee Gas,* the price consideration should not be made the prime determinant of what the public convenience and necessity require." (R. 925, italics supplied.)

We respectfully submit that no amount of proof could warrant such a divorcement of inseparables, need and price. The need for natural gas at the pipeline level, the distributor level or the consumer level of the interstate transmission process cannot possibly be evaluated in a vacuum, divorced from its cost. It might properly be assumed that there is a continuing need for gas at *reasonable* prices at all three levels. But, just as the shopper's "need" for merchandise evaporates when the merchant sees him com-

ing and boosts the price, so does the need for gas evaporate when a price hold-up operation commences.

In the field of regulated utilities, the need for essential services and commodities is ever present. It is this need which gives rise to the regulation. And the regulation has as its primary purpose the prevention of price exploitation by monopolistic suppliers of the regulated services or rapacious purveyors of the vital commodities. Under such circumstances, to say that need out-weighs price considerations is but to abandon all semblance of regulation, or at least render it farcical.

We submit that the Commission was in error as a matter of law in purporting to separate the factors, purporting to balance them, and, upon finding considerations of need to be more impressive, discarding price as the "prime determinant" in this Section 7 proceeding.

Furthermore, and apart therefrom, in this instance the "need" side of the scale was very definitely lacking in weight. The proof reflected in this record relating to needs of the "public served through the Tennessee Gas system" is insubstantial; it affords inadequate support for the finding; and it in no way supports the determination to dispense with further consideration of the matter of price.

The *sole* evidence in this record of any need at all for this or any other gas in the interstate market is epitomized in the short statement of Tennessee's Vice-President, Mr. Witmer:

> "Q. Why did Tennessee Gas Transmission Company enter into those contracts? A. The purpose was to obtain gas reserves to supply the expansion of Tennessee's market, as is shown in Tennessee's pending application in Docket G-11107" (R. 46).

In its two previous orders, the Commission made no reference to any *other* need for gas. In its April 22 order,

it erroneously stated that the examiner "has found there is a need for these volumes of gas on the system of Tennessee . . . These findings we adopt" (R. 836, italics added). In its May 20 order, it merely stated that, in view of CATCO's refusal to accept the temporary certificate provided for in the April 22 order, it was modifying that order, *inter alia*: "In view of the need for the volumes of gas . . ." (R. 904). Finally, in the June 24 order, with no further discussion—with no further reference to the record—we progress from Tennessee's need for gas to fill up its contemplated additional pipelines, full swing to the "great need" for gas by "the public served through the Tennessee gas system."

The only explanation for the finding of this "great", price-supervening need for gas, contained in this record is a footnote appended to the Commission's April 22 order, in conjunction with its grant of a temporary certificate to Tennessee to construct the 107 miles of gathering pipeline to bring the CATCO gas ashore and to Kinder, Louisiana. This footnote reads:

> "By letter of March 29, 1957, Tennessee Gas was granted a temporary certificate for facilities covered by the same application in docket No. G-11107, but specifically excluding the 107 miles of pipeline referred to here" (R. 836).

Thus it appears that on the same date that the presiding examiner's report was issued in this case, the Commission issued a temporary certificate to Tennessee in Docket G-11107—a proceeding, the evidence here shows, related to "the expansion of Tennessee's market", to supply which expansion Tennessee had entered into the CATCO contracts. Thus it appears that the Commission having refused to consolidate Tennessee's application in Docket G-11107 with the present CATCO cases—proceeded by way of a

temporary certificate in Docket G-11107 to permit Tennessee to construct the facilities with which to "expand its market", and thereby established the "need" upon the basis of which the Commission subsequently predicated its abandonment of the "price consideration" as the "price determinant of what the public convenience and necessity require" in this case.

The unreasonableness of the Commission's June 27 order in this respect thus becomes plain. Having made *independent* determinations in respect of the two facts of need and price—(1) need, by the issuance of a temporary certificate to Tennessee in Docket No. G-11107 and (2) price, by withholding unconditional certificates to the CATCO applicants in its April 22 and May 20 orders—when thereafter faced with the CATCO threat to terminate the gas sales contracts, the Commission was caught on the horns of a dilemma of its own concoction. Either it had to tear up Tennessee's temporary certificate—and thus dispense with further consideration of the "need" for gas—*or* it had to knuckle under to the CATCO demands and thereby dispense with further consideration of the matter of price.

In getting itself into the dilemma in the first place and in its selection of the way out, we respectfully submit, the Commission's action was wholly unwarranted, arbitrary and capricious.

So much for the only other motivation and purported justification for the Commission's final determination herein.

## POINT IV.

**The judgment of the Court below was eminently correct.**

The Court below did not dwell at length upon or determine with the definitiveness which we feel it deserves at the hands of this Court, what we believe is *the* crucial, vitally important aspect of this case. That is, the nature, scope and imperativeness of the Commission's statutory obligation with respect to the matter of price in the context of a producer certificate application under Section 7 of the Natural Gas Act.

The Court took note of (a) the authority of the Commission to attach reasonable conditions to its issuance of a producer certificate; (b) the practice of the Commission in imposing price (rate) conditions in pipeline certifications; (c) the intent of Congress in enacting Section 7 to bestow upon the Commission "full scope" in doing so; (d) the Commission's previous denomination of a producer's initial price as the "vital element" in his demonstration of public convenience and necessity; and, finally, (e) the Commission's professed policy of according "great weight" to initial rate matters. 257 F. 2d 721. It then observed:

> "While the commission *probably* should always consider the impact of the proposed initial rate in its determination of public convenience and necessity, we do not reach the question of whether the Commission *must fix the initial rate* when its inquiry demonstrates that there is a substantial question of the reasonableness of that initial rate. See Oklahoma Natural Gas Co. *v.* Federal Power Commission, and the dissenting opinion of Judge Bazelon, D. C. Cir., 257 F. 2d 634, 642.

> In the cases before us, the Commission has left no doubt of the importance and necessity of a consideration of the reasonableness of the proposed initial rate." 257 F. 2d 721-2 (emphasis supplied).

As has been demonstrated (*supra*, pp. 36-43), the Court's unfortunate use of the word "probably" in the first sentence of that statement and its neglect to "reach" the most important question the case presented, has served to lend solace to the Commission for its post-June 24, 1957, relegation of the troublesome matter of the producer's initial price to oblivion [*Matter of Hope Nat. Gas Co.*, 19 F. P. C. 405 (March 31, 1958); *Matter of Seaboard Oil Co.*, 19 F. P. C. 416 (March 31, 1958); *Matter of Sunray Mid-Continent Oil Co.*, 19 F. P. C. 618 (May 9, 1958); *Matter of Superior Oil Co.*, 19 F. P. C. 637 (May 9, 1958); *Matter of United Gas Pipe Line Co.*, 19 F. P. C. 931 (June 12, 1958)] and to lend impetus to its post-June 30, 1958 aiding, abetting and encouraging of the next boost in the producer price level in southern Louisiana from the instant 22.4¢ to 23.3¢ [*Matter of Transcontinental Gas Pipe Line Corp.*, 20 F. P. C. 264 (September 4, 1958)]—with 24.05¢ currently on the way [*Matter of Trunkline Gas Co.*, Docket No. G-15394 *et al.*].

However, the damage done is not irremediable. This case and *United Gas Improvement Co. and Philadelphia Electric Co.* v. *F. P. C.*, CA 3rd, No. 12,797; *Public Service Commission of New York* v. *F. P. C.*, CA 3rd, No. 12,805 (to be heard in June) encompass the major recent misapplications of Section 7 of the Natural Gas Act. It is not too late for this Court to restore that section to full stature (Point I, *supra*.). It is long past the time for judicial elevation to the pre-eminence they deserve of the views, observations and contentions in this respect of the

one voice in the wilderness (Commissioner Connole's) which has been heard persistently, forcefully and cogently, pointing out to the majority of the Commission the error of its ways.' [R. 930-34; 19 F. P. C. 410, 427, 561, 620, 639, 932; 20 F. P. C. 288—particularly the latter]. This we respectfully and urgently request of this Court.

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* The Court below accepted as well within the Commission's province its April 22 and May 20, 1957 expressions of "the importance and necessity of a consideration of the reasonableness of the proposed initial rate" (257 F. 2d 721-2) and went on from there to take note that: "It was only after the threat of withholding gas from the interstate market that the Commission retreated . . ." (257 F. 2d 722)—*retreated without refuting, rescinding or altering in the least* its previous solemn findings in this respect.

Obviously, the Commission "changed its mind" (CATCO Br., pp. 13, 39-41)—which in a proper case, of course, it has the power to do. *Cia Mexicana de Gas* v. *F. P. C.*, 167 F. 2d 804 (CA 5th, 1948). But a valid exercise of such power requires "some basis to indicate that it is reason and judgment that has brought about the change." *Dixie Carriers* v. *U. S.*, 143 F. Supp. 844, 854, (DC, S. D. Tex., 1956). There must be "basic facts [and] underlying reasons—leading the Commission intelligently and as a matter of deliberative judgment in good faith to contrary conclusions." *Amarillo-Borger Express* v. *U. S.*, 138 F. Supp. 411, 419 (DC, N. D. Tex., 1956). And, of course, as in the case of any determination, it must appear that "its final conclusion was supported by substantial evidence in the record taken as a whole." *Hudson River*

*Day Line* v. *U. S.*, 85 F. Supp. 225, 227 (DC, S. D. N. Y., 1949).

There was no change in the basic facts here. From the outset (by virtue of the Commission's March 29 temporary certificate issued in Docket No. G-11107), there was a "need", of sorts, for this gas by Tennessee. The Commission so found in its April 22 and May 20 orders—the only change made on June 24 was the superfluous addition of the characterization "great" and the attribution thereof to the public to be served by Tennessee. There had been no showing—at any time—that the unprecedently high price of 22.4 cents per Mcf. was in the public interest. On the contrary, such testimony and facts as are contained in the record abundantly demonstrate the contrary. As Commissioner Connole said: "No voice has been raised to dispute the facts that were set out so clearly in our Order of April 22, 1957. To my legal understanding, they are still facts" (R. 932).

Neither did the threat attributed to the CATCO applicants present a truly new factor. When the Commission on April 22 granted temporary certificates and remanded the case to the presiding examiner "to determine at what rates the public convenience and necessity requires these sales," in effect, it rejected these sales at the proposed price. When the CATCO applicants applied for rehearing of that order, they *then* refused to commit their gas to these sales on the Commission's terms. When the Commission imposed the conditions contained in its May 20 order, it *again* rejected the sales at the proposed price, unless the CATCO applicants would undertake in a subsequent Section 4 proceeding to establish that it was just and reasonable. CATCO's threatened refusal to accept the terms of that order, posed nothing new. The May 20

order itself contemplated the possibility of such a refusal—it required that the certificates "be accepted in writing and under oath within 30 days from the date of the issuance of this order . . ." (R. 908).

There being no change in the basic facts, the Commission's complete reversal of its previously adopted solemn determinations could only constitute an unsupportable and invalid "change of mind." It could not "make serious findings of this nature, and then without more, announce they no longer exist." *Amarillo-Borger Express* v. *U. S.*, 138 F. Supp. 411, 419 (DC N. D. Tex. 1956). This was not a rational, intelligent exercise of deliberative judgment supported by substantial evidence in the record taken as a whole. It was a reversal of previously adopted ultimate findings and conclusions, upon the wholly erroneous theory that price could properly be subordinated to the need for gas if withdrawal of newly pledged supplies is threatened by the pledgor. Of it, the Court below said:

> "The Commission has jurisdiction to issue certificates under Section 7 (e) based upon its independent judgment after an untrammelled consideration of all the elements which it deems necessary to arrive at that judgment. Congress has not given the Commission power to inquire into the issue of public convenience and necessity where, as here, the applicant circumscribes the scope of that inquiry by attaching a condition to its application requiring the Commission to forego the consideration of an element which may be necessary in the formulation of its judgment. Otherwise stated, the Commission has not been endowed by Congress with jurisdiction to conduct a *limited* inquiry . . ."
>
> "The Commission's function is to regulate the sale of gas by producers willing to sell under regulations arrived at in accordance with the provisions

> of the Act. Such regulations may not be the result of bargaining with an unwilling seller." 257 F. 2d 723.

In this, as in its final judgment, the Court below was absolutely right. In this, contrary to petitioners' insistence here that the Court labored under a "misapprehension" (Tenn. Br., pp. 17, 33; CATCO Br., pp. 12, 32-3), the Court was obviously well aware that no provision of the Natural Gas Act compels any producer to accept a certificate unsatisfactory to itself or to make a commitment to accept an unsatisfactory certificate as a condition precedent to the filing of an application. The Court was obviously aware that the CATCO applicants had it within their physical ability and legal right to make good their threats of withdrawal. They had reserved that power specifically in their contracts with Tennessee (R. 28, 287-8). They had—as had the Commission in the Court below—carefully emphasized the point in their briefs.

The Court below was simply not about to permit of perpetuation of the thesis of the Commission's June 24 order—*viz,* the greater the need of the consuming public for gas (as evidenced by the willingness of the pipeline supplier to pay a higher price than anyone else) the less important is the Commission's inquiry into the propriety of the price demanded; and, with the addition to that of a threat to withdraw new supplies, inquiry into the propriety of price may be abandoned altogether and—the inevitable consequences notwithstanding—relegated to the limbo of utterly ineffectual Section 5 proceedings.

The decision below, that the Commission had no authority (jurisdiction) to permit consideration of the threat factor (one *not* within the ambit of the statutory standard of public convenience and necessity) to supersede or

exclude the vital necessity for scrutiny of the propriety of the price (a consideration very definitely within that ambit), is in complete accord with the decisions of this and other Courts that an administrative agency, in the performance of a discretionary function, has no power to consider or rely upon matters which are outside the scope of, or irrelevant to, the statutory criteria upon which its discretion must properly be exercised and its decision must properly rest. See e.g. *Accardi* v. *Shaughnessy*, 347 U. S. 260 (1954), *Wolf* v. *Boyd*, 238 F. 2d 249, 254 (CA. 9th, 1956). And its denomination of that error as jurisdictional instead of an "abuse of discretion", "arbitrary, capricious" or "in excess of authority" is wholly immaterial here.

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There simply is no substance to petitioners' assertions of error on the part of the Court below in raising an objection *sua sponte* in contravention of Section 19(b) of the Natural Gas Act (Tenn Br., pp. 19, 37-38; CATCO Br., pp. 7, 43-47).

The prohibition against resolution by appellate courts of issues not raised or brought to the attention of the lower tribunal (administrative or judicial) is designed to prevent the institution of unnecessary appeals, by compelling litigants to call all claimed error to the attention of that original body so that it may have the opportunity to consider, rule on and, if necessary, correct such error.

To satisfy the "objection" requirement of Section 19(b) of the Natural Gas Act (or a similarly worded statute or rule*) it is sufficient to identify the action, ruling or determination complained of and to set forth the reasons for the objection with sufficient clarity and specificity to enable

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* Identical or similar provisions are common in regulatory statutes and are akin to F. R. C. P. 46.

the Commission to appraise the objection and to take advantage of its opportunity to correct its own errors. *May Stores* v. *Labor Board*, 326 U. S. 376, 386, n. 5 (1945). This we did here in full.

Our application for rehearing of the Commission's order of June 24, 1957 stated:

> "The always-present power to reject unsatisfactory certificates and the threat to use that power has never, so far as we are aware, been thought to eliminate, modify or affect the proof required by statute to establish public convenience and necessity. It is inconceivable that it should be otherwise, or that public convenience and necessity should ever require or permit abject submission by a regulatory agency to any ultimatum of a regulated company. If the existence of the power to reject, accompanied by the threat to use it, could eliminate the necessity for proof of one 'vital element' (propriety of price) of convenience and necessity, it could as readily eliminate the necessity for proof of all other elements. It could justify the issuance of certificates on nothing more than an application together with a threat to reject any certificate which failed to grant everything the application demanded. . . ."
>
> . . . . . .
>
> "It may be quite true that under the Natural Gas Act the Commission is powerless to compel the dedication of additional gas to interstate commerce. We do not believe, however, that that fact permits emasculation of the provisions of the statute which direct the Commission to control and regulate, for the benefit of the consumer, the terms, conditions and prices at which interstate gas shall flow" (R. 538-539).

Our petition for review to the Court of Appeals stated:

> ". . . The only new factor involved in the final determination and the sole inspiration therefor was

the threat by the CATCO applicants to withdraw from their contracts with Tennessee and to withhold their gas from the interstate market.

"The record before the respondent did not justify the reversal of its previous orders upon the basis of such a threat. The abject submission of the respondent to that threat, in complete negation of its statutory responsibilities under the Natural Gas Act to protect the consumer interests, was unlawful, arbitrary and capricious" (R. 483).

Petitioners' insistence that these statements did not provide an adequate statutory basis for the decision of the Court below rests upon a strained and unsupported construction of the word "objection" and betrays a complete misconception of the practical function the objection is intended to serve. It cannot be seriously suggested that the Commission was denied an opportunity to reconsider the merits of its decision because of the absence of an argument, in *haec verba*, directed to its "jurisdiction" as distinguished from its authority. The duty to voice an objection and state the grounds therefor does not require the complaining party, at its peril, to affix the correct adjective label to the erroneous action or decision complained of. Nor does it compel the reviewing court to choose between (1) unqualified adoption of the legal conclusions contained in that party's application for rehearing or (2) affirmance of the erroneous decision. The cases cited by petitioners do not so hold. Therein the issue was the failure of the complainants to object before the Commission to the particular *action* sought to be reviewed in Court, not the adequacy or inadequacy of its description of the *legal effect* of that action.

Every court, including this one, may, often does, and indeed must be free to decide cases on legal principles

which vary to a greater or lesser extent from the precise formulations urged on them by the successful party. (See, for example, *U. S.* v. *Shaughnessy*, 206 F. 2d 897, 900, (CA 2d. 1953), *rev. sub nom, Accardi* v. *Shaughnessy* (1954), 347 U. S. 260, 268). It would, we submit, encase the law in a strait-jacket of impossible severity, if courts were precluded from holding that actions complained of were not only unlawful but were unlawful for reasons graver and more fundamental than the complainant advanced.

## Conclusion.

For the foregoing reasons it is respectfully submitted that the judgment below should be affirmed, with a definitive answer by this Court to each of the questions herein presented, for the guidance of the Commission upon remand.

Respectfully submitted,

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